(26)

No. 06-562
Title: United States, Petitioner
v.
Atlantic Research Corporation
Docketed: October 24, 2006
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (05-3152)
Decision Date: August 11, 2006
Questions Presented

Date	Proceedings and Orders
Oct 24 2006	Petition for a writ of certiorari filed. (Response due November 24, 2006)
Nov 22 2006	Brief amicus curiae of Aviall Services, Inc. filed.
Dec 6 2006	DISTRIBUTED for Conference of January 5, 2007.
Dec 8 2006	Response Requested . (Due January 8, 2007)
Jan 2 2007	Brief of respondent Atlantic Research Corporation in support filed.
Jan 3 2007	DISTRIBUTED for Conference of January 19, 2007.
Jan 9 2007	Reply of petitioner United States filed. (Distributed)
Jan 19 2007	Petition GRANTED.
Feb 5 2007	SET FOR ARGUMENT ON Monday, April 23, 20007.
Feb 22 2007	Record received from U.S.C.A. for 8th Circuit. (1 envelope)
Mar 1 2007	Joint appendix filed.
Mar 1 2007	Brief of petitioner United States filed.
Mar 2 2007	Brief amicus curiae of Huron Valley Steel Corporation filed.
Mar 5 2007	Brief amici curiae of Cooper Industries, LLC, et al. filed.
Mar 5 2007	Brief amicus curiae of Reading Company filed.
Mar 20 2007	Record received from U.S.D.C. for Western District of Arkansas. (1 envelope)
Mar 21 2007	CIRCULATED.
Mar 30 2007	Motion of Washington, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
Apr 4 2007	Brief amici curiae of Ford Motor Company and General Motors Corporation filed. (Distributed)
Apr 4 2007	Brief amicus curiae of Metropolitan Water Reclamation District of Greater Chicago filed. (Distributed)
Apr 5 2007	Brief amici curiae of Former Administrator Carol M. Browner, et al. filed. (Distributed)
Apr 5 2007	Brief amicus curiae of Consolidated Edison Company of New York, Inc. filed. (Distributed)
Apr 5 2007	Brief amicus curiae of City of New York filed. (Distributed)
Apr 5 2007	Brief amicus curiae of Lockheed Martin Corporation filed. (Distributed)
Apr 5 2007	Brief amici curiae of Natural Resources Defense Council, et al. filed. (Distributed)
Apr 5 2007	Brief of respondent Atlantic Research Corporation filed. (Distributed)
Apr 5 2007	Brief amicus curiae of United States Conference of Mayors filed. (Distributed)
Apr 5 2007	Brief amicus curiae of James Kotrous filed. (Distributed)

Apr 5 2007	Brief amici curiae of Association of California Water Agencies, et al. filed. (Distributed)
Apr 5 2007	Brief amici curiae of E.I. Du Pont De Nemours and Company, et al. filed. (Distributed)
Apr 5 2007	Brief amici curiae of Superfund Settlements Project, et al. filed. (Distributed)
Apr 5 2007	Brief amici curiae of Washington, et al. filed. (Distributed)
Apr 5 2007	Brief amicus curiae of Aviall Services, Inc. filed. (Distributed)
Apr 13 2007	Motion of Washington, et al. for leave to participate in oral argument as amici curiae and for divided argument GRANTED.
Apr 13 2007	Reply of petitioner United States filed. (Distributed)
Apr 23 2007	Argued. For petitioner: Thomas G. Hungar, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondent: Owen T. Armstrong, Jr., Milwaukee, Wis.; and Jay D. Geck, Deputy Solicitor General, Olympia, Wash. (for Washington, et al., as amici curia

Supreme Court, U.S.
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(1)

No. 06-562

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC RESEARCH CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a party that is potentially responsible for the cost of cleaning up property contaminated by hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, but that does not satisfy the requirements for bringing an action for contribution under Section 113(f) of CERCLA, 42 U.S.C. 9613(f), may bring an action against another potentially responsible party under Section 107(a), 42 U.S.C. 9607(a).

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In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

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ATLANTIC RESEARCH CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 459 F.3d 827. The order and opinion of the district court (App., *infra*, 20a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 107 and 113 of CERCLA, 42 U.S.C. 9607, 9613, are reproduced in the appendix to this petition (App., *infra*, 29a-76a).

STATEMENT

This case presents the principal question left open by this Court two Terms ago in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004): Whether a party that is potentially responsible for the cleanup of property contaminated by hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, but is not eligible to bring an action for contribution under Section 113(f) of CERCLA, 42 U.S.C. 9613(f), may nevertheless bring an action against another potentially responsible party under Section 107(a), 42 U.S.C. 9607(a). In this case, the Eighth Circuit, consistent with an earlier decision of the Second Circuit but in conflict with a later decision of the Third Circuit, held that a potentially responsible party could pursue such an action under Section 107(a). The Eighth Circuit's decision is incorrect and merits this Court's review.

1. Congress enacted CERCLA in 1980 in response to the serious environmental and health dangers posed by property contaminated by hazardous substances. *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). As amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, CERCLA provides the President, acting primarily through the Environmental Protection Agency (EPA), with several alternative means for cleaning up contaminated property. Section 104 of CERCLA authorizes EPA to undertake response actions designed to remove

hazardous substances, using monies from the Hazardous Substances Superfund. See 42 U.S.C. 9604; *Bestfoods*, 524 U.S. at 55. Section 106(a) permits EPA to compel, by means of an administrative order or a request for judicial relief, other persons to undertake response actions, which EPA then monitors. See 42 U.S.C. 9606(a). A person subject to such an order may petition EPA for reimbursement of its costs and, if the petition is denied, may bring suit to recover those costs on the ground that the person is not liable or that the selected response action was improper. See 42 U.S.C. 9606(b).

Section 107(a) imposes liability for cleanup costs on four categories of "[c]overed persons"—typically known as potentially responsible parties (PRPs)—associated with the release or threatened release of hazardous substances. See 42 U.S.C. 9607(a). PRPs are defined as (1) owners and operators of facilities at which hazardous substances are located; (2) past owners and operators of such facilities at the time that disposal of hazardous substances occurred; (3) persons who arranged for disposal or treatment of hazardous substances; and (4) certain transporters of hazardous substances. See 42 U.S.C. 9607(a)(1)-(4). Unless they can invoke a statutory defense or exclusion, persons who qualify as PRPs are liable for, *inter alia*, "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan," 42 U.S.C. 9607(a)(1)-(4)(A), and "any other necessary costs of response incurred by any other person consistent with the national contingency plan," 42 U.S.C. 9607(a)(1)-(4)(B).[1]

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[1] The national contingency plan consists of federal regulations that prescribe the procedure for conducting hazardous substance cleanups

Since the enactment of CERCLA, courts have consistently held that the United States (or a State or an Indian tribe) may bring suit against any PRP under Section 107(a)(1)-(4)(A) to recover response costs that it has incurred, and may proceed on a theory of joint and several liability (except to the extent that the PRP can show that the alleged harm is divisible). See, *e.g.*, *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1121 (3d Cir. 1997). Before CERCLA was amended by SARA in 1986, however, lower courts disagreed on whether one PRP could bring an action against another PRP for contribution or cost recovery, and, if so, the source of authority for such an action. Compare, *e.g.*, *City of Philadelphia* v. *Stepan Chemical Co.*, 544 F. Supp. 1135, 1140-1143 (E.D. Pa. 1982) (holding that PRP had right to cost recovery under Section 107(a)(1)-(4)(B)), and *United States* v. *New Castle County*, 642 F. Supp. 1258, 1261-1269 (D. Del. 1986) (holding that PRP had right to contribution under federal common law), with *United States* v. *Westinghouse Electric Corp.*, No. IP 83-9-C, 1983 WL 160587, at *3-*4 (S.D. Ind. June 29, 1983) (holding that PRP had no right to contribution).

With the enactment of SARA, Congress added Section 113(f), which expressly supplies PRPs with a cause of action against other PRPs in certain circumstances. See 42 U.S.C. 9613(f). First, Section 113(f)(1) provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [Section 107(a)], during or following any civil action under [Section 106] or under [Section 107(a)]." 42 U.S.C. 9613(f)(1). With regard to such actions, Section 113(f)(2)

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under CERCLA and other federal laws. See CERCLA § 105, 42 U.S.C. 9605; 40 C.F.R. Pt. 300.

specifies that "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. 9613(f)(2). Second, Section 113(f)(3)(B) provides that "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement referred to in [Section 113(f)(2)]." 42 U.S.C. 9613(f)(3)(B). After SARA's enactment, courts of appeals consistently held that a PRP could not bring an action against another PRP for cost recovery, on a theory of joint and several liability, under Section 107(a), but was instead limited to an action for contribution under one of the two provisions of Section 113(f).[2]

In *Cooper Industries*, *supra*, this Court held that, in order to pursue an action for contribution against another PRP under Section 113(f)(1), a PRP must itself be sued under either Section 106 or Section 107(a). See 543

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[2] See *Bedford Affiliates* v. *Sills*, 156 F.3d 416, 423-425 (2d Cir. 1998); *Centerior Serv. Co.* v. *Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998); *Pneumo Abex Corp.* v. *High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 776 (4th Cir.), cert. denied, 525 U.S. 963 (1998); *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); *New Castle County*, 111 F.3d at 1121-1124; *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *Control Data Corp.* v. *S.C.S.C. Corp.*, 53 F.3d 930, 935 (8th Cir. 1995); *United States* v. *Colorado & E. R.R.*, 50 F.3d 1530, 1534-1536 (10th Cir. 1995); *United Technologies Corp.* v. *Browning-Ferris Indus.*, 33 F.3d 96, 100 (1st Cir. 1994), cert. denied, 513 U.S. 1183 (1995); *Akzo Coatings, Inc.* v. *Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

U.S. at 165-168. The Court left open the question presented here—namely, whether a PRP could bring an action against another PRP for cost recovery under Section 107(a), see *id.* at 168-170—but it noted that "numerous decisions of the Courts of Appeals" had held that an action under Section 107(a) for cost recovery, on a theory of joint and several liability, was unavailable, *id.* at 169.

2. As alleged in the complaint, respondent leased property in an industrial park in Camden, Arkansas, from 1979 to 2003. From 1981 to 1986, respondent retrofitted rocket motors under contract with the United States. In the course of conducting that retrofitting, respondent used a high-pressure washing system to remove propellant from the motors. Wastewater containing the propellant contaminated soil and groundwater at the site. Respondent also burned quantities of propellant, further contaminating the soil and groundwater. In addressing the contamination, respondent incurred various cleanup costs. App., *infra*, 23a-25a.

In 2002, respondent filed suit against the United States in the United States District Court for the Western District of Arkansas, seeking to recover costs from the government (as a PRP) under either Section 113(f) or Section 107(a). After this Court's decision in *Cooper Industries*, respondent dropped its Section 113(f) claim. The government moved to dismiss the action for failure to state a claim on the ground that, because respondent was a PRP, it could not bring suit under Section 107(a).

3. The district court granted the motion to dismiss. App., *infra*, 21a-28a. Relying on an Eighth Circuit decision that preceded *Cooper Industries*, the district court concluded that "a party that is subject to CERCLA liability is limited to seeking contribution from other

jointly liable parties in accordance with Section 113(f), unless the PRP qualifies for one of three defenses." *Id.* at 25a. The court rejected respondent's contention that *Cooper Industries* had "undermined the fundamental support for [the Eighth Circuit's decision] and other circuits' decisions that Section 113(f) limits PRPs' claims for contribution and precludes actions between PRPs for direct recovery under Section 107(a)." *Id.* at 26a.

4. The court of appeals reversed. App., *infra*, 1a-19a. The court noted that, while *Cooper Industries* had left open the question whether a PRP could proceed under Section 107(a), it had indicated that Sections 107(a) and 113(f) provided "distinct" remedies. *Id.* at 13a. Accordingly, the court reasoned, "it is no longer appropriate to view § 107's remedies exclusively through a § 113 prism." *Id.* at 13a-14a. In light of *Cooper Industries*, therefore, the court revisited the availability of a cause of action under Section 107(a). *Id.* at 13a-14a.

The court of appeals first held that Section 107(a)(1)-(4)(B) provided a PRP with an express right of cost recovery against another PRP. App., *infra*, 14a-15a. In so doing, the court relied heavily on the Second Circuit's decision in *Consolidated Edison Co. of New York, Inc.* v. *UGI Utilities, Inc.*, 423 F.3d 90 (2005), petition for cert. pending, No. 05-1323 (filed Apr. 14, 2006). The court reasoned that Section 107(a)(1)-(4)(B) applied "[o]n its face," because respondent was a "person" under CERCLA and had incurred "necessary costs of response." App., *infra*, 14a. The court recognized that "§ 107 allows 100% cost recovery," but asserted that, "[i]f a plaintiff attempted to use § 107 to recover more than its fair share of reimbursement, a defendant would be free to counterclaim for contribution under § 113(f)." *Id.* at 15a. Moreover, the court noted, without elabora-

tion, that "[t]his right is available to parties who have incurred necessary costs of response, but have neither been sued nor settled their liability under §§ 106 or 107." *Id.* at 14a.

The court of appeals held, in the alternative, that "a right to contribution may be fairly implied from the text of [§] 107(a)(4)(B)." App., *infra*, 15a. The court rejected the argument that, "in enacting § 113, Congress intended to eliminate the preexisting right to contribution it had allowed for court development under § 107." *Id.* at 16a. The court reasoned that, "if Congress intended § 113 to completely replace § 107 in all circumstances, even where a plaintiff was not eligible to use § 113, it would have done so explicitly." *Id.* at 16a-17a.

In the court of appeals' view, a contrary holding would "result[] in an absurd and unjust outcome," because "the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle." App., *infra*, 18a. Congress, the court concluded, "did not create a loophole by which the Republic could escape its own CERCLA liability by perversely abandoning its CERCLA enforcement power." *Id.* at 19a.

REASONS FOR GRANTING THE PETITION

In the wake of this Court's decision in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004), there is a clear conflict among the courts of appeals on the question left open in that case: *i.e.*, whether a potentially responsible party can pursue an action against another PRP under Section 107(a). Moreover, the court of appeals' decision in this case, holding that a PRP can bring suit under Section 107(a), is contrary to the text

and structure of the statute and would create perverse incentives for PRPs not to enter into settlements with the government. Because the question presented is important, recurring, and ripe for resolution by this Court, the petition should be granted.

A. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

1. Since this Court's decision in *Cooper Industries*, three courts of appeals have addressed the availability of a cause of action by one PRP against another PRP under Section 107(a). The decision below is consistent with the Second Circuit's decision in *Consolidated Edison Co. of New York, Inc.* v. *UGI Utilities, Inc.*, 423 F.3d 90 (2005), petition for cert. pending, No. 05-1323 (filed Apr. 14, 2006), but is in direct conflict with the Third Circuit's decision in *E.I. DuPont de Nemours & Co.* v. *United States*, 460 F.3d 515 (2006), petition for rehearing pending, No. 04-2096 (filed Oct. 13, 2006).

a. In *Consolidated Edison*, one PRP sued another PRP under Section 113(f)(1) to recover costs that it had incurred and would incur in cleaning up contamination at the sites of manufactured gas plants. 423 F.3d at 93-94. After this Court's *Cooper Industries* decision made clear that Section 113(f)(1) was inapplicable, the plaintiff PRP argued that it could bring suit under Section 113(f)(3)(B) instead, because it had entered into a "Voluntary Cleanup Agreement" with the New York State Department of Environmental Conservation. *Id.* at 95. The Second Circuit held that the PRP was not entitled to invoke Section 113(f)(3)(B) because the agreement could not "be construed to have resolved [the PRP's] CERCLA liability." *Id.* at 97.

Although the plaintiff PRP had not asserted that it could sue under Section 107, and indeed had "appear[ed] willing to accept * * * that section 107(a) may never provide a right of action for a [PRP]," 423 F.3d at 99, the Second Circuit *sua sponte* addressed that question and held that the plaintiff PRP could bring suit under Section 107(a). *Id.* at 97-103. The court acknowledged that it, like other courts of appeals, had previously held that a PRP could not bring an action against another PRP for cost recovery under Section 107(a) but was instead limited to an action for contribution under Section 113(f). *Id.* at 98-99 (citing *Bedford Affiliates* v. *Sills*, 156 F.3d 416 (2d Cir. 1998)). But the court concluded that its earlier decision (which "h[e]ld that a potentially responsible person * * * cannot maintain a § 107(a) action against another potentially responsible person," *Bedford Affiliates*, 156 F.3d at 425) had arisen in a different factual setting and could have been decided without resolving that question. 423 F.3d at 99-102.

Having addressed that precedent, the Second Circuit held that "section 107(a) permits a party that has not been sued or made to participate in an administrative proceeding, but that, if sued, would be held liable under section 107(a), to recover necessary response costs incurred voluntarily." 423 F.3d at 100. According to the court, "determining whether [such] a party * * * may sue under section 107(a) is easily resolved based on that section's plain language." *Id.* at 99. The court reasoned that, under Section 107(a), "[t]he only questions we must answer are whether [the PRP] is a 'person' and whether it has incurred 'costs of response.'" *Ibid.* "Unlike some other courts," the court continued, "we find no basis for reading into [Section 107(a)] a distinction between so-called 'innocent' parties and [PRPs]." *Ibid.* The court

stated that "Section 107(a) makes its cost recovery remedy available, in quite simple language, to *any* person that has incurred necessary costs of response, and nowhere does the plain language of section 107(a) require that the party seeking necessary costs of response be innocent of wrongdoing." *Id.* at 100.[3]

The Second Circuit added that, in its view, a contrary reading of Section 107(a) would "impermissibly discourag[e] voluntary cleanup." 423 F.3d at 100. According to the court, "[t]his would undercut one of CERCLA's main goals." *Ibid.*

b. By contrast, in *DuPont*, *supra*, the Third Circuit expressly rejected the approaches of the Second Circuit in *Consolidated Edison* and of the court of appeals in this case (which heavily relied on *Consolidated Edison*) and held that a PRP cannot bring suit against another PRP under Section 107(a). In *DuPont*, various PRPs sued the United States (as a PRP), seeking to recover costs for the cleanup of multiple sites nationwide. 460 F.3d at 525. Like the Second Circuit in *Consolidated Edison*, the Third Circuit began by recognizing that it had previously held that a PRP could not bring an action against another PRP for cost recovery under Section 107(a). 460 F.3d at 528 (citing *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997), and *In re Reading Co.*, 115 F.3d 1111 (3d Cir. 1997)). Unlike the Second Circuit, however, the Third Circuit did not view its earlier cases as distinguishable. *Id.* at

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[3] With regard to the concern that a PRP suing under Section 107(a) would be entitled to joint and several liability, the court observed that "there appears to be no bar precluding a person sued under section 107(a) from bringing a counterclaim under section 113(f)(1) for offsetting contribution against the plaintiff volunteer [PRP]." 423 F.3d at 100 n.9.

530-531. The court also determined that "no intervening authority provides a basis sufficient to reconsider those precedents." *Id.* at 528. The court reasoned that the Supreme Court's decision in *Cooper Industries* "did not explicitly or implicitly overrule our precedents" but instead "expressly declined to consider the very questions at issue here." *Id.* at 532.

The Third Circuit rejected the argument that a rule precluding one PRP from suing another under Section 107(a) would be "in direct opposition to CERCLA's broad remedial purpose." 460 F.3d at 533. The court observed that, "[w]hile it is clear that CERCLA's drafters intended common law principles to govern liability, we have not found evidence in the legislative history that Congress contemplated this would extend a contribution right to PRPs engaged in entirely voluntary cleanups." *Id.* at 535. Moreover, the court noted, "SARA's legislative history * * * reveals an express bent toward encouraging settlements." *Id.* at 536. The court concluded that "SARA's settlement scheme is inconsistent with * * * a right" to recover costs for a voluntary cleanup. *Id.* at 538. Instead, the court reasoned, "Congress intended to allow contribution for settling or sued PRPs as a way to encourage them to admit their liability, settle with the Government, and begin expeditious cleanup operations pursuant to a consent decree or other agreement." *Id.* at 541.

The Third Circuit acknowledged that "it could be that encouraging *sua sponte* voluntary cleanups by capable PRPs is in the public's interest, and would be a better way to protect health and the environment than pressuring them into settlement agreements." 460 F.3d at 542. The court reasoned, however, that "[t]his is not self-evident." *Id.* at 542-543. Instead, the court con-

cluded, "the debate over whether our national environmental cleanup laws should favor prompt and effective cleanups in any manner * * * or should favor settlements and other enforcement actions * * * is a matter for Congress, not our Court." *Id.* at 543.[4]

2. The court of appeals' decision in this case also conflicts with numerous pre-*Cooper Industries* decisions from other courts of appeals. See p. 5, note 2, *supra*. In those cases, the courts held that one PRP could not bring actions against another under Section 107(a) in various circumstances in which the plaintiff PRP could not avail itself of Section 113(f), including (1) where (as here) the PRP had not yet been sued under either Section 106 or Section 107(a) (and was therefore seeking to recover the costs of a voluntary cleanup), see, *e.g.*, *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298, 1301-1306 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); (2) where the PRP had failed to bring a Section 113(f) contribution action within the applicable limitations period, see, *e.g.*, *United Techs. Corp.* v. *Browning-Ferris Indus.*, 33 F.3d 96, 101 (1st Cir. 1994), cert. denied, 513 U.S. 1183 (1995); and (3) where the PRP could not sue the defendant PRP under Section 113(f) because the defendant PRP had reached a settlement with the government, see, *e.g.*, *United States* v. *Colorado & E. R.R.*, 50 F.3d 1530, 1534-1536 (10th Cir. 1995); *Akzo Coatings, Inc.* v. *Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

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[4] Judge Sloviter dissented. She noted that "[t]wo of our sister circuits have recently considered the same issue presented here and both have decided, contrary to the majority, that section 107(a) can be used by a responsible party to seek contribution from another responsible party." 460 F.3d at 547.

Although those decisions arise in various factual contexts, many of them state their holdings in broad terms that categorically foreclose a PRP from bringing an action against another PRP for cost recovery under Section 107(a). See, *e.g.*, *Pneumo Abex Corp.* v. *High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 776 (4th Cir.) (noting that "section [113] must be used by parties who are themselves potentially responsible parties"), cert. denied, 525 U.S. 963 (1998); *New Castle County*, 111 F.3d at 1120 (stating that "[a]n action brought by a potentially responsible person is by necessity a Section 113 action for contribution"); *Rumpke of Ind., Inc.* v. *Cummins Engine Co.*, 107 F.3d 1235, 1240 (7th Cir. 1997) (reasoning that, "when two parties who both injured the property have a dispute about who pays how much—a derivative liability, apportionment dispute—the statute directs them to § 113(f) and only to § 113(f)"). To be sure, the recent decisions of the Second and Eighth Circuits demonstrate the capacity of courts of appeals to revisit their precedents after *Cooper Industries*. Nevertheless, other courts may follow the Third Circuit's lead and reaffirm their pre-*Cooper Industries* precedents. In either event, those precedents underscore the need for this Court to provide clarification on the question presented.

As matters currently stand, therefore, a PRP may bring a Section 107(a) action against another PRP for cost recovery in the Second and Eighth Circuits, but is foreclosed from doing so in the Third Circuit and appears to be foreclosed from doing so in as many as seven other circuits. See p. 5, note 2, *supra*. The Court's intervention is warranted to resolve this clear and direct circuit conflict.

B. The Decision Below Is Incorrect

The court of appeals erred by holding that one PRP could bring an action against another PRP under Section 107(a).

1. Section 107(a) does not authorize one PRP to sue another. The relevant language in that section provides that PRPs—*i.e.*, the universe of persons who fall into the four categories enumerated in Section 107(a)(1)-(4)—shall be liable for "any other necessary costs of response incurred *by any other person* consistent with the national contingency plan." CERCLA § 107(a)(1)-(4)(B), 42 U.S.C. 9607(a)(1)-(4)(B) (emphasis added). That passively worded provision "impliedly authorizes suit" by "any other person" against PRPs. *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 818 (1994); but see *id.* at 822 (Scalia, J., dissenting in part) (characterizing provision as creating an express cause of action). The most natural reading of the phrase "any *other* person" is that it excludes the persons who are the subject of the sentence: *i.e.*, PRPs. Cf. *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 342-343 & n.3 (2005) (holding that statutory phrase "another country" excluded countries listed in previous clauses, on ground that "both 'other' and 'another' are just as likely to be words of *differentiation* as they are to be words of connection").[5] Such a reading of the statute does not strip Section 107(a)(1)-(4)(B) of operative effect, because it

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[5] The court of appeals correctly noted (App., *infra*, 14a) that a PRP constitutes a "person" for purposes of CERCLA. See CERCLA § 101(21), 42 U.S.C. 9601(21). The relevant inquiry, however, is not simply whether a PRP qualifies as a "person," but whether it qualifies as "any other person," and thus an eligible plaintiff, under Section 107(a)(1)-(4)(B).

still provides a cause of action for persons *other* than PRPs, namely, "innocent" private parties who have incurred the requisite costs. See *New Castle County*, 111 F.3d at 1120; *United Technologies*, 33 F.3d at 99-100. Under that reading, however, Section 107(a)(1)-(4)(B) does not authorize PRPs to sue each other for cost recovery.[6]

The court of appeals seemingly suggested (App., *infra*, 15a) that Section 107 more generally contains an implied right to contribution. As a preliminary matter, it is "debatable" whether Section 107 contains an implied right of contribution at all. *Cooper Industries*, 543 U.S. at 162; see, *e.g.*, *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 638-647 (1981); *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 90-99 (1981); see generally *Alexander* v. *Sandoval*, 532 U.S. 275, 290 (2001) ("The express provision of one

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[6] At one point, the court of appeals suggested that "'any other person' means any person other than the statutorily enumerated 'United States Government or a State or an Indian tribe.'" App., *infra*, 14a. That suggestion lacks merit. To be sure, the preceding subparagraph of Section 107(a) provides a parallel cause of action for those enumerated governmental entities against PRPs. See CERCLA § 107(a)(1)-(4)(A), 42 U.S.C. 9607(a)(1)-(4)(A). It does not follow, however, that the phrase "any other person" in Section 107(a)(1)-(4)(B) was intended merely to exclude those entities (as opposed to PRPs generally) from asserting a claim under that subparagraph. To the contrary, other operative language in Section 107(a)(1)-(4)(B)—namely, its reference to "other necessary costs" (*i.e.*, costs other than the costs specified in Section 107(a)(1)-(4)(A), see, *e.g.*, *Wickland Oil Terminals* v. *Asarco, Inc.*, 792 F.2d 887, 891 (9th Cir. 1986))—ensures that those governmental entities can recover only under Section 107(a)(1)-(4)(A) and are precluded from recovering under Section 107(a)(1)-(4)(B). Thus, far from giving meaning to the phrase "any other person" in Section 107(a)(1)-(4)(B), the court of appeals' interpretation in fact renders it entirely superfluous.

method of enforcing a substantive rule suggests that Congress intended to preclude others."). Even if an implied right to contribution did exist, however, it would not help respondent, because Section 107 would at most contain an implied right to "contribution" in its "traditional sense": *i.e.*, a claim by one party to recover an amount from a jointly liable party after the first party has extinguished a disproportionate share of their common liability to a third party. *United Technologies*, 33 F.3d at 99; see, *e.g.*, *Northwest Airlines*, 451 U.S. at 87-88 ("Typically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability."); *Black's Law Dictionary* 297 (5th ed. 1979) ("Under principle of 'contribution,' a tortfeasor against whom a judgment is rendered is entitled to recover proportional shares of judgment from other joint tort-feasors whose negligence contributed to the injury and who were also liable to the plaintiff."). In this case, respondent is not seeking "contribution" as that term is traditionally defined, but is instead seeking to recover costs from a voluntary cleanup. Nothing in any provision of Section 107 suggests an implied right to "contribution" in such a broader and all-encompassing sense.[7]

2. Even assuming that Section 107(a), standing on its own, could be construed to confer on a PRP a cause of action against another PRP for cost recovery, that provision must be read in light of Section 113(f), which provides a PRP with an express cause of action against another in two specific circumstances: (1) where the

[7] The same would be true with regard to any right to contribution that might exist as a matter of federal common law. See App., *infra*, 17a n.9 (leaving open existence of such a right).

PRP is seeking contribution "during or following any civil action" under Section 106 or Section 107(a), see CERCLA § 113(f)(1), 42 U.S.C. 9613(f)(1); or (2) where the PRP is seeking contribution after entering into an administrative or judicially approved settlement with the government, see CERCLA § 113(f)(3)(B), 42 U.S.C. 9613(f)(3)(B). The better view is that the subsequently enacted Section 113(f) specifies the exclusive circumstances in which one PRP may bring suit against another under CERCLA. See, *e.g.*, *United States* v. *Fausto*, 484 U.S. 439, 453 (1988) (explaining that "the implications of a statute may be altered by the implications of a later statute").

Were that not true, a PRP could readily circumvent the various limitations on an action under Section 113(f) simply by pursuing an action under Section 107(a), thereby rendering Section 113(f) effectively superfluous. See, *e.g.*, *New Castle County*, 111 F.3d at 1122-1123; *Colorado & E.R.R.*, 50 F.3d at 1536; *United Technologies*, 33 F.3d at 101. Thus, a PRP that was outside the three-year limitations period for an action under Section 113(f), see CERCLA § 113(g)(3), 42 U.S.C. 9613(g)(3), could take advantage of the typically more generous limitations period for an action under Section 107(a), see CERCLA § 113(g)(2), 42 U.S.C. 9613(g)(2). And a PRP that wished to sue another PRP that had itself reached a settlement with the government (and thus could not be sued under Section 113(f)), see CERCLA § 113(f)(2) and (f)(3)(B), 42 U.S.C. 9613(f)(2) and (f)(3)(B), could simply sue that PRP under Section 107(a), which contains no analogous limitation on a settling PRP's liability in an action for cost recovery. Similarly, there is no justification for permitting a PRP to circumvent Section 113(f)'s express limitation on bringing suit *before* an action un-

der Section 106 or Section 107(a) is commenced (or a settlement is reached), see CERCLA § 113(f)(1) and (f)(3)(B), 42 U.S.C. 9613(f)(1) and (f)(3)(B); *Cooper Industries*, 543 U.S. at 168, simply by pursuing an action under Section 107(a) itself. Such an interpretation would "violate the settled rule that [courts] must, if possible, construe a statute to give every word some operative effect." *Id.* at 167.[8]

The savings clause in Section 113(f)(1) does not dictate a different result. That clause provides that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [Section 106 or Section 107]." That clause, however, saves only actions for "contribution"—and there is no reason to think that the savings clause uses the term "contribution" in anything other than its common-law sense. See, *e.g.*, *Field* v. *Mans*, 516 U.S. 59, 69 (1995) (noting that, "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to

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[8] The court of appeals acknowledged that the latter form of circumvention was permissible under its reading of the statute. See App., *infra*, 14a (noting that the right to sue under Section 107 "is available to parties who have incurred necessary costs of response, but have neither been sued nor settled their liability under §§ 106 or 107"); cf. *Consolidated Edison*, 423 F.3d at 100 (holding that "section 107(a) permits a party that has not been sued or made to participate in an administrative proceeding, but that, if sued, would be held liable under section 107(a), to recover necessary response costs incurred voluntarily"). The court of appeals stated in dictum (App., *infra*, 17a) that PRPs who *do* have a right to seek contribution under Section 113(f) would be relegated to that provision as their exclusive remedy, but offered no justification for that *ipse dixit*—which would in any event leave all other PRPs free to evade the strictures of Section 113(f).

incorporate the established meaning of these terms") (citations and internal quotation marks omitted). If the savings clause were read to apply even to such cost-recovery actions (and assuming *arguendo* that Section 107(a) initially permitted such actions), it would enable a PRP, notwithstanding the language of Section 113(f)(1), to bring suit even *before* an action under Section 106 or Section 107(a) is commenced—in contravention of the rule that a savings clause should not be interpreted to nullify operative language in the same statute in which it is contained. See, *e.g.*, *AT&T Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 227-228 (1998). Instead, the savings clause merely preserves the ability of a PRP to bring an action for contribution (as that term is traditionally defined) under any other provision of law, including state law. See, *e.g.*, *Atherton* v. *FDIC*, 519 U.S. 213, 227-228 (1997).

The legislative history of SARA, which added Section 113(f) to CERCLA, further supports the conclusion that a PRP may not bring an action against another PRP for cost recovery under Section 107(a). For example, the House Committee on Energy and Commerce stated that Section 113(f) "does not affect the right of the *United States* to maintain a cause of action for cost recovery under Section 107 or injunctive relief under Section 106, whether or not the U.S. was an owner or operator of a facility or a generator of waste at the site." H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 1, at 79-80 (1985) (emphasis added). The implication of that statement is either that the Committee was operating on the assumption that a private PRP was not entitled to "maintain a cause of action for cost recovery under Section 107" in the first place, or that the Committee did not believe

that any such cause of action would survive the enactment of Section 113(f).[9]

3. Allowing a PRP to pursue an action against another PRP under Section 107(a) would undermine CERCLA's settlement scheme. Under that scheme, the government has "obvious and important leverage to encourage quick and effective resolution of environmental disputes." *Reading Co.*, 115 F.3d at 1119. A PRP has considerable incentive to enter into a settlement with the government, because, if it does, it will enjoy protection from contribution while securing the ability to seek contribution itself from non-settling PRPs. If it does not, on the other hand, it will be unable to seek contribution from other PRPs and may face the prospect of potentially disproportionate liability.

If the court of appeals' rule is upheld, however, a PRP that has not yet been sued under Section 106 or Section 107(a) might be well advised to *refuse* to settle with the government, in order to preserve its right to sue other PRPs under Section 107(a) and thereby take advantage of the substantially more generous provisions applicable to such an action. For example, whereas a PRP suing another PRP under Section 113(f) is limited to recovering that PRP's equitable share of its costs, see, *e.g.*, *Elementis Chromium L.P.* v. *Coastal States*

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[9] Consistent with that legislative history, courts have recognized that, notwithstanding Section 113(f), the United States retains the right to enforce CERCLA through either Section 106 or Section 107(a) even when it also happens to be a PRP (and therefore may be liable for at least some cleanup costs). *See, e.g.*, *United States* v. *Monsanto Co.*, 858 F.2d 160, 164 & n.2, 173 & n.28 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); *United States* v. *Chrysler Corp.*, 157 F. Supp. 2d 849, 859-861 (N.D. Ohio 2001); *United States* v. *Kramer*, 757 F. Supp. 397, 414 (D.N.J. 1991).

Petroleum Co., 450 F.3d 607, 612-613 (5th Cir. 2006), a PRP suing another PRP for cost recovery under Section 107(a) would potentially be entitled to proceed on a theory of joint and several liability to recover *all* of its costs, see App., *infra*, 14a-15a; *Consolidated Edison*, 423 F.3d at 100 n.9, thereby placing the burden on the other PRP to pursue (1) any defense of divisibility or (2) any counterclaim for contribution (or claims for contribution against other available, non-settling PRPs) under Section 113(f).

A PRP could seemingly also bring an action for cost recovery under Section 107(a) against another PRP that had itself reached a settlement with the government, notwithstanding the protective shield that Congress adopted to encourage such settlements in Section 113(f)(2) (which, by its terms, applies only to claims for "contribution"). Conversely, a PRP might have a disincentive to settle with the government insofar as it thought that it might be the object of *another* PRP's action for cost recovery under Section 107(a), because the PRP would seemingly not be able to use any settlement as a defense against such an action. Allowing PRPs to bring actions for cost recovery under Section 107 would thus weaken the effectiveness of Section 113(f)'s settlement provisions and thereby compromise the government's ability to bring closure to CERCLA cleanups.

4. In *Consolidated Edison*, the Second Circuit reasoned that a reading of Section 107(a) that precluded one PRP from bringing an action against another for cost recovery would "impermissibly discourag[e] voluntary cleanup," in contravention of "one of CERCLA's main goals." 423 F.3d at 100; see App., *infra*, 18a (stating that the court of appeals' holding in this case was

"consistent with CERCLA's goal of encouraging prompt and voluntary cleanup of contaminated sites"). Given the clear meaning of the text of the statute, however, "there is no need * * * to consult the purpose of CERCLA at all." *Cooper Industries*, 543 U.S. at 167. In any event, as the Third Circuit explained at length in *DuPont*, there is little evidence that, in enacting CERCLA and SARA, Congress intended to promote *sua sponte* cleanups *at the expense of* government-supervised cleanups pursuant to settlement or suit—and, in fact, there is ample support for the contrary view. See 460 F.3d at 533-543.

Moreover, contrary to the Second Circuit's assumption, the inability of one PRP to bring an action against another for cost recovery under Section 107(a) may not affect a PRP's incentives to engage in a voluntary cleanup, at least where a cleanup by the current property owner would enhance the value of a property to such an extent that the absence of an action for cost recovery would not be a meaningful deterrent. In sum, it is not clear that policy considerations support the court of appeals' rule in this case, but even if they did, such considerations could not overcome the text and structure of the statute, which make clear that Section 113(f) provides the exclusive mechanisms by which one PRP can sue another under CERCLA.[10]

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[10] The court of appeals in this case relied on an additional policy consideration: namely, that, if one PRP were foreclosed from suing another under Section 107(a), "the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle." App., *infra*, 18a. There is no empirical basis for that concern. See *DuPont*, 460 F.3d at 541 n.31. To the contrary, the government has not previously hesitated to bring suit, or enter into settlements, even when

C. The Question Presented Is Important And Warrants Review At This Time

The question whether a PRP can bring an action against another PRP under Section 107(a) is a recurring one of great importance to the operation of CERCLA. In addition to the many courts of appeals that had addressed various aspects of that question before this Court decided *Cooper Industries*, see p. 5, note 2, *supra*, three courts of appeals have now passed on the question since that decision, and at least two other courts of appeals are considering the question in pending cases.[11] Moreover, numerous district courts have also addressed the question, with conflicting results.[12]

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it may lead to the imposition of substantial liability on federal PRPs. See, *e.g.*, *United States* v. *Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002), cert. denied, 537 U.S. 1147 (2003); *United States* v. *Vertac Chem. Corp.*, 46 F.3d 803 (8th Cir.), cert. denied, 515 U.S. 1158 (1995); *Coeur d'Alene Tribe* v. *Asarco Inc.*, 280 F. Supp. 2d 1094 (D. Idaho 2003); 69 Fed. Reg. 67,607 (2004); 69 Fed. Reg. 51,326 (2004); 67 Fed. Reg. 8557 (2002). And the court of appeals overlooked the fact that enforcement actions by state or tribal authorities or "innocent" private parties (or settlement agreements with state authorities) can also trigger a right to seek contribution under Section 113(f)(1) or (3).

[11] See *Metropolitan Water Reclamation Dist.* v. *North American Galvanizing & Coatings, Inc.*, No. 05-3299 (7th Cir. argued Jan. 20, 2006); *Goodrich Corp.* v. *County of San Bernardino*, No. 05-56694 (9th Cir.).

[12] Compare, *e.g.*, *City of Bangor* v. *Citizens Commc'ns Co.*, 437 F. Supp. 2d 180, 222-223 (D. Me. 2006); *Raytheon Aircraft Co.* v. *United States*, 435 F. Supp. 2d 1136, 1145-1150 (D. Kan. 2006); *Sunnyside Dev. Corp., LLC* v. *Opsys U.S. Corp.*, No. C 05-01447 SI, 2006 WL 1128039, at *2 (N.D. Cal. Apr. 27, 2006); *Ferguson* v. *Arcata Redwood Co., LLC*, No. C 03-05632 SI, 2005 WL 1869445, at *6 (N.D. Cal. Aug. 2, 2005); *Kotrous* v. *Goss-Jewett Co. of N. Cal., Inc.*, No. Civ. S02-1520 FCD JFM, 2005 WL 1417152, at *3-*4 (E.D. Cal. June 16, 2005); *Viacom*,

This Court need not await further percolation in the lower courts before deciding the question presented. That question is cleanly presented in this case; the opinions of the three courts of appeals to have decided the issue post-*Cooper Industries* contain extensive discussions of the arguments on both sides; and, in light of the post-*Cooper Industries* division of authority in the lower courts, it is unlikely that those courts will reach consensus on the appropriate resolution of the question. Moreover, the continued uncertainty concerning the availability of an action for cost recovery under Section 107(a) is resulting in the significant expenditure of judicial and party resources, especially given the complex and time-consuming nature of CERCLA litigation. In some cases, it appears that such uncertainty may be deterring PRPs from entering into settlements with the government. And in those jurisdictions that have recognized the availability of Section 107(a) actions, courts and litigants are devoting substantial resources to the litigation of claims that may ultimately prove to be unavailable. The

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Inc. v. *United States*, 404 F. Supp. 2d 3, 6-9 (D.D.C. 2005); and *Vine Street LLC* v. *Keeling*, 362 F. Supp. 2d 754, 760-764 (E.D. Tex. 2005) (all allowing PRPs to sue under Section 107(a)), with *Aviall Servs., Inc.* v. *Cooper Indus., LLC*, No. 3:97-CV-1926-D, 2006 WL 2263305, at *3-*10 (N.D. Tex. Aug. 8, 2006); *R.E. Goodson Constr. Co.* v. *International Paper Co.*, No. C/A 4:02-4184-RBH, 2005 WL 2614927, at *5-*6, *8 (D.S.C. Oct. 13, 2005); *Montville Twp.* v. *Woodmont Builders, LLC*, No. Civ. A. 03-280 DRD, 2005 WL 2000204, at *3 (D.N.J. Aug. 17, 2005); *Boarhead Farm Agreement* v. *Advanced Envtl. Tech. Corp.*, 381 F. Supp. 2d 427, 435 (E.D. Pa. 2005); *City of Waukesha* v. *Viacom Int'l, Inc.*, 362 F. Supp. 2d 1025, 1027-1028 (E.D. Wis. 2005); *Mercury Mall Assocs., Inc.* v. *Nick's Mkt., Inc.*, 368 F. Supp. 2d 513, 519-520 (E.D. Va. 2005) (all foreclosing PRPs from suing under Section 107(a)).

Court's intervention is warranted now in order to provide definitive resolution on this important question concerning the remedies available under CERCLA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2006

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-3152

ATLANTIC RESEARCH CORP., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Submitted: Mar. 16, 2006
Filed: Aug. 11, 2006

Before WOLLMAN and RILEY, Circuit Judges, and ROSENBAUM,[1] District Judge.

ROSENBAUM, District Judge.

Atlantic Research Corporation ("Atlantic") seeks partial reimbursement from the United States for costs incurred in an environmental cleanup. Atlantic's claim is based on the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675 (2005), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613, 1615. The issue for consideration is whether CERCLA forbids a

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[1] The Honorable James M. Rosenbaum, Chief Judge, United States District Court for the District of Minnesota, sitting by designation.

party such as Atlantic, which has voluntarily cleaned up a site for which it was only partly responsible, to recover part of its cleanup costs from another liable party.[2] For the reasons that follow, we hold that CERCLA § 107 permits such a cause of action.

I. Background

Atlantic retrofitted rocket motors for the United States from 1981 through 1986. It performed this service at its Camden, Arkansas, facility. The work included using high-pressure water spray to remove rocket propellant. Once removed, the propellant was burned. Residue from burnt rocket fuel contaminated the Arkansas site's soil and groundwater.

Atlantic voluntarily investigated and cleaned up the contamination, incurring costs in the process. It sought to recover a portion of these costs from the United States by invoking CERCLA §§ 107(a) and 113(f).[3] Atlantic and the government began to negotiate in an effort to resolve these financial matters.

The negotiations ended with the United States Supreme Court decision in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157, 125 S. Ct. 577, 160 L.Ed.2d 548 (2004) ("*Aviall*"). In *Aviall*, the court found a party could only attempt to obtain § 113(f) contribution "during or following" a §§ 106 or 107(a) CERCLA civil

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[2] The district court dismissed this matter on the government's Rule 12(b)(6) motion. As such, the court assumed the facts most favorably to Atlantic, the non-moving party. We do the same; and therefore, assume, but do not decide, that the United States would be liable under CERCLA.

[3] These sections have been codified at 42 U.S.C. §§ 9607(a) and 9613(f). For convenience, this Opinion refers to the statute sections as designated in CERCLA, rather than as later codified.

action. *Id.* at 161, 125 S. Ct. at 580. As no action had been commenced against Atlantic under either §§ 106 or 107(a), the *Aviall* decision barred its § 113(f) contribution claim.

With its § 113(f) claim *Aviall*-foreclosed, Atlantic amended its complaint. The amended complaint relied solely on § 107(a) and federal common law. In lieu of answer, the government moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing this Court's pre-*Aviall* decision in *Dico., Inc.* v. *Amoco Oil Co.*, 340 F.3d 525 (8th Cir. 2003) ("*Dico*") foreclosed Atlantic's § 107 claim. The district court agreed. Atlantic appeals.

As will be discussed in more detail below, *Dico* held that a liable party could not bring an action under § 107. *Dico*, 340 F.3d at 531. We recognize the generally preclusive effect of a previous panel's ruling. *United States* v. *Blahowski*, 324 F.3d 592, 596-97 (8th Cir. 2003). But this rule is not inflexible. Where the prior decision can be distinguished, or its rationale has been undermined, a subsequent decision can depart from the prior path.[4] We are convinced *Dico* is such a case; it is clearly distinguishable from the case at bar, and its analytic is undermined by *Aviall*.

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[4] "[I]t is well settled that a panel may depart from circuit precedent based on an intervening opinion of the Supreme Court that undermines the prior precedent." *T.L.* v. *United States*, 443 F.3d 956, 960 (8th Cir. 2006), *citing Young* v. *Hayes*, 218 F.3d 850, 853 (8th Cir. 2000). As will be seen, while *Aviall* has undermined *Dico's* reasoning for parties in Atlantic's position, its holding remains viable for those parties which still have recourse to relief under § 113. Accordingly, *Dico* can be reconciled with our present holding and we need not ultimately answer whether *Aviall* compels reconsideration of *Dico*.

II. Analysis

As this case turns on the interpretation of CERCLA, a federal statute, our review is de novo. *Iowa 80 Group, Inc.* v. *Internal Revenue Service*, 406 F.3d 950, 952 (8th Cir. 2005). We undertake this review, recognizing our obligation to effectuate the intent of Congress when interpreting federal statutes. *Id.* To resolve the question before us, we must briefly review the intertwined history of CERCLA §§ 107 and 113, and then analyze this history in light of *Aviall*.

A. CERCLA Cost Recovery and Contribution—Pre-*Aviall*

CERCLA is Congress's monumental attempt to "encourage the timely cleanup of hazardous waste sites," and "place the cost of that response on those responsible for creating or maintaining the hazardous condition." *Control Data Corp.* v. *S.C.S.C. Corp.*, 53 F.3d 930, 935-36 (8th Cir. 1995) (internal quotations and citations omitted). To achieve these ends, CERCLA effectively transformed centuries of real property and tort liability law by making those who contaminate a site strictly liable for the costs of subsequent cleanup by others. *See* Alexandra B. Klass, *From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims*, 39 Wake Forest L. Rev. 903 (2004); Ronald G. Aronovsky, *Federalism & CERCLA: Rethinking the Role of Federal Law in Private Cleanup Cost Disputes*, 33 Ecology L.Q. 1, 9 (2006).

When the federal or a state government conducts the cleanup, CERCLA permits the sovereign to recover its costs from whomever is liable for the contamination. § 107(a)(4)(A). CERCLA also provides three methods

by which private parties may recover cleanup costs. The first is found at § 107(a)(4)(B), a part of the original statute in 1980. Congress added the others, §§ 113(f)(1) and 113(f)(3)(B), as part of SARA.[5]

Sections 107(a) and 113(f)(1) are central to our analysis. The Eighth, and many of its sister Circuits, have previously held that liable parties seeking reimbursement must use § 113(f)(1), and may not use § 107 for that purpose. Today, we consider whether this ruling remains viable in the post-*Aviall* world.

CERCLA's § 107(a) provides that "covered persons," which we will call "liable parties,"[6] are liable for, among other things:

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

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[5] The last of these, § 113(f)(3)(B), concerns the rights of settling parties. As the parties in this case have obviously not reached a settlement, § 113(f)(3)(B) is not examined here.

[6] Many prior opinions have called these "potentially responsible parties" (abbreviated "PRP"). We decline to use this term. The PRP term has been developed by the courts. It is not found in CERCLA. The term refers to "a party who may be covered by the statute at the time the party is sued under the statute." *Pneumo Abex Corp.* v. *High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 773 n.2 (4th Cir. 1998). After *Aviall*, the term has been weakened and "may be read to confer on a party that has not been held liable a legal status that it should not bear." *Consolidated Edison Co.* v. *UGI Utils., Inc.*, 423 F.3d 90, 98 n.8 (2d Cir. 2005).

> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan[.]

107(a)(4)(A), (B). Courts have found in CERCLA's reference to "any other necessary costs of response" and "any other person," authority to allow private suits under 107(a)(4)(B). *See Walls* v. *Waste Resource Corp.*, 761 F.2d 311, 318 (6th Cir. 1985) (collecting cases).

Section 113 contains a subsection entitled "Contribution," the first part of which states:

> Any person may seek contribution from any other person who is liable or potentially liable under [§ 107(a)], during or following any civil action under [§§ 106 or 107(a)]. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§§ 106 or 107].

§ 113(f)(1).

There is some similarity in the remedial responsibilities borne by liable parties under §§ 107(a) and 113(f). The Supreme Court has termed these sections' remedies "similar and somewhat overlapping," yet "clearly distinct." *Compare Key Tronic Corp.* v. *United States*, 511 U.S. 809, 816, 114 S. Ct. 1960, 1966, 128 L. Ed. 2d 797 (1994) *with Aviall*, 543 U.S. at 163 n.3, 125 S. Ct. at 582

n.3. Each requires proof of the same elements. *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996). They differ, however, in procedure and scope.

1. Section 107(a) Remedies

Section 107(a) has a six-year statute of limitations, and allows a plaintiff to recover 100% of its response costs from all liable parties, including those which have settled their CERCLA liability with the government. §113(g)(2), 107(a). Prior to SARA's enactment, some courts implied a right to contribution from § 107, *see Mardan Corp.* v. *C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457 n.3 (9th Cir. 1986) (collecting cases), or as a matter of federal common law. *United States* v. *New Castle County*, 642 F. Supp. 1258, 1265-66 (D. Del. 1986). The right initially was thought to be uncertain in light of the Supreme Court's traditional reluctance to imply rights of action in the context of other statutes. *See, e.g., Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639-40, 101 S. Ct. 2061, 2066, 68 L. Ed. 2d 500 (1981) (declining to imply an antitrust right of action for contribution).

2. Section 113 Remedies

Congress resolved the uncertainty when enacting SARA in 1986 by adding § 113 to "clarif[y] and confirm" a right to CERCLA contribution. *United Technologies Corp.* v. *Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100 (1st Cir. 1994), citing S. Rep. No. 11, 99th Cong., 1st Sess. 44 (1985). Section 113's explicit right to contribution is more restricted than that afforded by 107. Section 113's right is subject to a three-year statute of limitations; plaintiffs can recover only costs in excess of

their equitable share, and may not recover from previously-settling parties. § 113(f)(1), (f)(2), (g)(3).

3. The Section 107(a)/Section 113 Conflict—Pre-*Aviall*

Congress's addition of § 113 posed a dilemma. Courts saw that CERCLA, as amended, created a situation where litigants might "quickly abandon section 113 in favor of the substantially more generous provisions of section 107," thus rendering § 113 a nullity. *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1123 (3d Cir. 1997).

To prevent § 107 from swallowing § 113, courts began directing traffic between the sections. *See id.*; *United Techns.*, 33 F.3d at 101; *Bedford Affiliates* v. *Sills*, 156 F.3d 416, 424 (2d Cir. 1998). As a result, regardless of which CERCLA section a plaintiff invoked, courts typically analyzed §§ 107 and 113 together, aiming to distinguish one from the other. *See Bedford Affiliates*, 156 F.3d at 424; *Centerior Serv. Co.* v. *Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 347 (6th Cir. 1998); *Pneumo Abex Corp.* v. *High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 776 (4th Cir. 1998); *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298, 1301-02 (9th Cir. 1997); *New Castle County*, 111 F.3d at 1121-22; *Redwing Carriers*, 94 F.3d 1489, 1513 (11th Cir. 1996); *United States* v. *Colorado & Eastern R.R. Co.*, 50 F.3d 1530, 1534-35 (10th Cir. 1995); *United Techns.*, 33 F.3d at 99; *Akzo Coatings, Inc.* v. *Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994); *Amoco Oil Co.* v. *Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989).

Traffic-directing dramatically narrowed § 107 by judicial fiat. On its face, § 107(a)(4)(B) is available to "any . . . person" other than the sovereigns listed in § 107(a)(4)(A). *See Control Data Corp.*, 53 F.3d at 936

n.9. In practice, however, courts gradually steered liable parties away from § 107 and required them to use § 113; § 107 was reserved for "innocent" plaintiffs who could assert one of the statutory defenses to liability. *See Bedford Affiliates*, 156 F.3d at 424; *Pinal Creek*, 118 F.3d at 1301; *New Castle County*, 111 F.3d at 1124; *Redwing Carriers*, 94 F.3d at 1496; *Centerior Service*, 153 F.3d at 349; *United Techns.*, 33 F.3d at 100; *Akzo Coatings*, 30 F.3d at 764-65. This cramped reading of § 107 prevented liable parties from using it to evade § 113's Congressionally-mandated constraints, thus preserving the vitality of § 113. *See New Castle County*, 111 F.3d at 1121; *Colo. & Eastern*, 50 F.3d at 1538; *United Techns.*, 33 F.3d at 98.

In the pre-*Aviall* analysis, § 113 was presumed to be available to all liable parties, including those which had not faced a CERCLA action. *See Akzo Coatings*, 30 F.3d at 763 n.4 (liable party's § 113 claim for costs voluntarily incurred held barred by settlement); *Pinal Creek*, 118 F.3d at 1306 (liable party's claim for costs voluntarily incurred governed by both §§ 107 and 113). Accordingly, most courts concluded liable parties could not use § 107. *See Pneumo Abex*, 142 F.3d at 776 (collecting cases); *but see Pinal Creek*, 118 F.3d at 1302 (holding liable parties could not seek direct recovery under § 107, but that § 107 implicitly incorporates a claim for contribution" which remains available to liable parties through combined operation of both sections); *United Techns.*, 33 F.3d at 99 n.8 (suggesting, in dicta, that a liable party may bring contribution action under § 107).

Our opinion in *Dico* was the last in this pre-*Aviall* line. The Environmental Protection Agency ("EPA") had forced Dico, Inc., and another party to clean up an

Iowa site which both had contaminated. Dico sued the other party, seeking direct recovery of 100% of its costs under § 107 and for contribution under § 113. The other party settled with the EPA and moved for summary judgment in Dico's lawsuit. The district court granted the motion. It found Dico's § 113 claims were barred by the settlement and, as a liable party, Dico had no right to recover its full cleanup cost under § 107.

Dico appealed the dismissal of its § 107 claim, arguing the Supreme Court's opinion in *Key Tronic* allowed liable parties a claim in direct recovery. We disagreed, noting *Key Tronic* dealt with a pre-SARA implied right to § 107 contribution. *Dico*, 340 F.3d at 531. When we affirmed the dismissal, we joined other Circuits in narrowly construing § 107, and holding a liable party may only assert a contribution claim under § 113. *Id.* at 530, citing among others *Bedford Affiliates*, 156 F.3d at 424; *Centerior Service*, 153 F.3d at 350; *Pinal Creek*, 118 F.3d at 1306; *Redwing Carriers*, 94 F.3d at 1496; *Colorado & Eastern*, 50 F.3d at 1536; *United Techns.*, 33 F.3d at 101; *Akzo Coatings*, 30 F.3d at 764; and *Amoco Oil*, 889 F.2d at 672. We now see that *Aviall* undermines *Dico*, and the judge-created analytic upon which it relies.

B. The Effect of *Aviall*

Aviall's facts are similar to those at hand. Aviall Services, Inc., purchased contaminated aircraft maintenance sites from Cooper Industries. The Texas Natural Resource Conservation Commission directed Aviall's efforts at environmental cleanup, but neither the Commission, the EPA, nor any private party brought a CERCLA action against Aviall.

After the cleanup, Aviall sued Cooper for both cost recovery under § 107 and contribution under § 113. It later amended its complaint, seeking recovery only under § 113, assuming—based on Circuit precedent—that its § 107 rights would be preserved in the § 113 claim. The district court granted Cooper's motion for summary judgment, holding Aviall had no right to § 113 relief absent a prior §§ 106 or 107 CERCLA enforcement action, and that Aviall's amended complaint abandoned any potential § 107 claim. A Fifth Circuit panel's affirmance was reversed, en banc.

On certiorari, the Supreme Court reversed again. Justice Thomas, writing for a seven-member majority, construed § 113's "during or following" language. He said, "[t]he natural meaning of this sentence is that contribution may only be sought subject to the specified conditions, namely, 'during or following' a specified civil action." *Aviall*, 543 U.S. at 165-66, 125 S. Ct. at 583. The Court found the words "during or following" established a condition precedent to a 113(f) claim. As such, a court which allowed a § 113 contribution claim, absent the prior §§ 106 or 107 action, would render § 113's precondition a nullity.

Having made this determination, the Court turned to its previous *Key Tronic* reference to CERCLA's "similar and somewhat overlapping" remedies. The Court explained that § 107's and 113's remedies were only "similar" in that "both allow private parties to recoup costs from other private parties." *Id.* at 163 n.3, 125 S. Ct. 577, 125 S. Ct. at 582 n.3. The Court carefully noted, however, that "the two remedies are clearly distinct." *Id.*

Dissenting Justices Ginsburg and Stevens analyzed *Key Tronic* differently. They said the *Key Tronic* court had not questioned whether § 107 afforded liable parties a cause of action against other liable parties. It simply disagreed whether the right was implied or explicit. *Id.* at 172, 125 S. Ct. at 586-87. Justices Ginsburg and Stevens did not agree that Aviall's amended complaint abandoned a § 107 claim, which they would have allowed to proceed. *Id.* at 174, 125 S. Ct. 577. The majority explicitly avoided this question, *see id.* at 173-74, 125 S. Ct. at 587-88, reserving it for another day.

C. The Matter At Hand

That day has arrived. We now ask: Can one liable party recover costs advanced, beyond its equitable share, from another liable party in direct recovery, or by § 107 contribution, or as a matter of federal common law?

The Second Circuit is the only Court which has considered this question since *Aviall*.[7] That Court revisited its pre-*Aviall* precedent, much as we have done here,

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[7] Pursuant to Federal Rule of Appellate Procedure 28(j), the United States has brought to our attention *Elementis Chromium L.P.* v. *Coastal States Petroleum Co.*, 450 F.3d 607 (5th Cir. 2006). In that case, the Fifth Circuit determined that the imposition of joint and several liability was inappropriate in a contribution claim under § 113. The Court cited *Redwing Carriers* for the proposition that " 'when one liable party sues another liable party under CERCLA, the action is not a cost recovery action under 107(a),' and the imposition of joint and several liability is inappropriate." *Elementis Chromium*, 450 F.3d at 613. As we have noted, *Redwing Carriers* is an example of the judicial traffic-directing that narrowed the scope of § 107 prior to *Aviall*. Because the Fifth Circuit was not asked to construe § 107 in its opinion, we decline to afford this isolated quotation touching on § 107 the weight the government believes it deserves.

and concluded that § 107 allowed one liable party to recover voluntarily incurred response costs from another. *Consolidated Edison Co.* v. *UGI Utilities, Inc.*, 423 F.3d 90, 100 (2d Cir. 2005). In reaching this conclusion, the court distinguished its holding in *Bedford Affiliates*, which—like *Dico*—had rejected a liable party's direct recovery claim under § 107. *Id.* at 102.

In light of *Aviall's* holding that §§ 107 and 113's remedies are distinct, the Second Circuit held "it no longer makes sense" to view section 113(f)(1) as the exclusive route by which liable parties may recover cleanup costs. *See Consolidated Edison Co.*, 423 F.3d at 99. The court looked to Section 107(a)(4)(B)'s "any other person" language, and found "no basis for reading into this language a distinction between so-called 'innocent' parties and parties which, if sued, would be held liable under section 107(a)." *Id.* at 99. So saying, the Second Circuit reopened § 107 cost recovery to liable parties.

Our Court now stands at the same crossroad. We agree with our sister Circuit, and hold that it no longer makes sense to view § 113 as a liable party's exclusive remedy. This distinction may have made sense for parties such as Dico, which was allowed to seek contribution under § 113. But here, Atlantic is foreclosed from using § 113. This path is barred because Atlantic—like Aviall—commenced suit before, rather than "during or following," a CERCLA enforcement action. Atlantic has opted to rely upon § 107 to try to recover its cleanup costs exceeding its own equitable share. We conclude it may do so.

The Supreme Court emphasized that §§ 107 and 113 are "distinct." Accordingly, it is no longer appropriate to view § 107's remedies exclusively through a § 113

prism, as we did in *Dico,* and as the government requests. We reject an approach which categorically deprives a liable party of a § 107 remedy. Like the Second Circuit, we return to the text of CERCLA, and find no such limitation in Congress's words.

We have held that "any other person" means any person other than the statutorily enumerated "United States Government or a State or an Indian tribe." *Control Data Corporation,* 53 F.3d at 936 n.9. Atlantic is such a "person," *see* CERCLA § 101(G)(21); no one disputes its having incurred "necessary costs of response." On its face § 107 applies.

As the Second Circuit stated, "[e]ach of those sections, 107(a) and 113(f)(1), embodies a mechanism for cost recovery available to persons in different procedural circumstances." *Consolidated Edison,* 423 F.3d at 99. Thus, a liable party may, under appropriate procedural circumstances, bring a cost recovery action under § 107. This right is available to parties who have incurred necessary costs of response, but have neither been sued nor settled their liability under §§ 106 or 107.

We recognize that § 107 allows 100% cost recovery. Some pre-*Aviall* cases justified denying liable parties access to § 107, reasoning Congress would not have intended them to recover 100% of their costs and effectively escape liability. *See, e.g., United Techns.,* 33 F.3d at 100 ("it is sensible to assume that Congress intended only innocent parties—not parties who were themselves liable-to be permitted to recoup the whole of their expenditures.") We agree, and reaffirm *Dico's* holding that a liable party may not use § 107 to recover its full response cost.

But § 107 is not limited to parties seeking to recover 100% of their costs. To the contrary, the text of § 107(a)(4)(B) permits recovery of "any other necessary costs of response . . . consistent with the national contingency plan." While these words may "suggest full recovery," *United Techns.*, 33 F.3d at 100, they do not compel it.[8] CERCLA, itself, checks overreaching liable parties: If a plaintiff attempted to use § 107 to recover more than its fair share of reimbursement, a defendant would be free to counterclaim for contribution under § 113(f). *Consolidated Edison*, 423 F.3d at 100, n.9; *Redwing Carriers*, 94 F.3d at 1495. Accordingly, we find that allowing Atlantic's claim for direct recovery under § 107 is entirely consistent with the text and purpose of CERCLA.

Alternatively, we are satisfied that a right to contribution may be fairly implied from the text of 107(a)(4)(B). Unlike some other statutes, CERCLA reflects Congress's unmistakable intent to create a private right of contribution. See *Northwest Airlines, Inc.* v. *Transp. Workers Union of Am.*, 451 U.S. 77, 91, 101 S. Ct. 1571, 1580, 67 L.Ed.2d 750 (1981) ("the ultimate question . . . is whether Congress intended to create the private remedy . . . that the plaintiff seeks to invoke"). We discern Congress's intent by looking to CERCLA's language, its legislative history, its underlying purpose and structure, and the likelihood that Congress intended to supersede or to supplement existing state remedies. *Id.*

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[8] Compare this text to § 107(a)(4)(A)'s more sweeping recovery of "all costs of response . . . not inconsistent with the national contingency plan."

Contribution is crucial to CERCLA's regulatory scheme. As the Supreme Court recognized in *Key Tronic*, "CERCLA is designed to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others." *Key Tronic*, 511 U.S. at 819, n.13, 114 S. Ct. 1960. At first, Congress left some CERCLA liability issues, such as joint-and-several liability and contribution, to be developed by the federal courts under "traditional and evolving principles of common law." *United States* v. *Chem-Dyne Corp.*, 572 F. Supp. 802, 806-07 (S.D. Ohio 1983). Courts, thereafter, held § 107 and federal common law supported a right of contribution. *Id.*; *Mardan Corp.*, 804 F.2d at 1457 n.3. But when Congress revisited CERCLA in 1986, it enacted an explicit right to contribution in § 113. This reflects Congress's unambiguous intent to allow private parties to recover in contribution.

We must next ask whether, in enacting § 113, Congress intended to eliminate the preexisting right to contribution it had allowed for court development under § 107. We conclude it did not. The plain text of § 113 reflects no intent to eliminate other rights to contribution; rather, § 113's saving clause provides that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action" under § 106 or § 107. § 113(f)(1). This view is further supported by examining § 113's legislative history reflecting Congress's intention to clarify and confirm, not to supplant or extinguish, the existing right to contribution. *See United Techns.*, 33 F.3d at 100, citing S. Rep. No. 11, 99th Cong., 1st Sess. 44 (1985). We conclude therefore that if Congress intended § 113 to completely replace § 107 in all circumstances, even where a plaintiff was not eligible to use § 113, it would

have done so explicitly. Accordingly, we consider the plain language of CERCLA to be consistent with an implied right to contribution for parties such as Atlantic.

We conclude that the broad language of § 107 supports not only a right of cost recovery but also an implied right to contribution.[9] *See Pinal Creek*, 118 F.3d at 1302 ("§ 107 implicitly incorporates a claim for contribution"); *United Techns.*, 33 F.3d at 99 n.8 ("It is possible that, although falling outside the statutory parameters for an express cause of action for contribution [under § 113(f)(1)], a [volunteer remediator] who spontaneously initiates a cleanup without governmental prodding might be able to pursue an implied right of action for contribution under § 107(c)"). We discern nothing in CERCLA's words, suggesting Congress intended to establish a comprehensive contribution and cost recovery scheme encouraging private cleanup of contaminated sites, while simultaneously excepting—indeed, penalizing—those who voluntarily assume such duties.

The government argues that if we allow Atlantic a 107 remedy, we will render § 113 meaningless. Appellee's Br. at 24-25. This argument fails; liable parties which have been subject to §§ 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continued vitality. But parties such as Atlantic, which have not faced a CERCLA action, and are thereby barred from § 113, retain their access to § 107. *See Key Tronic*, 511 U.S. at 818, 114 S. Ct. 1960; *United Techns.*, 33 F.3d at 99 n.8; *Pinal Creek*, 118 F.3d at 1301. This

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[9] As we have found a statutory right to direct recovery and contribution, we need not address Atlantic's claim of a similar right under federal common law. Accordingly, we leave that question for another day.

resolution gives life to each of CERCLA's sections, and is consistent with CERCLA's goal of encouraging prompt and voluntary cleanup of contaminated sites. *Key Tronic*, 511 U.S. at 819, n.13, 114 S. Ct. 1960.

A contrary ruling, barring Atlantic from recovering a portion of its costs, is not only contrary to CERCLA's purpose, but results in an absurd and unjust outcome. Consider: in this, of all cases, the United States is a liable party (who else has rocket motors to clean?). It is, simultaneously, CERCLA's primary enforcer at this, among other Superfund sites. *See* Sophia Strong, Note, *Aviall Services* v. *Cooper Industries: Implications for the United States' Liability Under CERCLA, the "Superfund Law"*, 56 Hastings L.J. 193, 198-99 (2004).

If we adopted the Government's reading of § 107, the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle. This bizarre outcome would eviscerate CERCLA whenever the government, itself, was partially responsible for a site's contamination.

Congress understood the United States' dual role. When it enacted SARA, it explicitly waived sovereign immunity. CERCLA § 120(a). This waiver is part and parcel of CERCLA's regulatory scheme. It shows Congress had no intention of making private parties shoulder the government's share of liability. Strong, 56 Hastings L.J. at 209-10.

Here, Atlantic assisted the United States by helping modernize its defenses. Atlantic, recognizing the deleterious environmental consequences, remediated the environment without compulsion. Its choice to do so, especially where the ultimate compulsory authority lay with

the United States-corporate, will not be held to its detriment. The United States, under CERCLA, is liable for its share of the burden.

The Court, then, concludes Congress resolved the question of the United States' liability 20 years ago. It did not create a loophole by which the Republic could escape its own CERCLA liability by perversely abandoning its CERCLA enforcement power. Congress put the public's right to a clean and safe environment ahead of the sovereign's traditional immunities.

We hold that a private party which voluntarily undertakes a cleanup for which it may be held liable, thus barring it from contribution under CERCLA's § 113, may pursue an action for direct recovery or contribution under § 107, against another liable party.

We reverse the judgment of the district court.

It is so ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

Case No. 02-CV-1199

ATLANTIC RESEARCH CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: June 1, 2005]

ORDER

Before the Court is the United States' Motion to Dismiss. (Doc. 28). ARC has responded. (Doc. 32). Upon consideration, for the reasons in the Opinion of even date, the Court finds the motion should be and hereby is **granted**.

IT IS SO ORDERED this 31 day of May, 2005.

/s/ HARRY F. BARNES
HON. HARRY F. BARNES
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

Case No. 02-CV-1199

ATLANTIC RESEARCH CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: June 1, 2005]

MEMORANDUM OPINION

Atlantic Research Corporation ("ARC") brings this lawsuit pursuant to the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601, *et seq.*, against the United States of America, seeking to recover cleanup costs ARC incurred at an environmentally contaminated facility in Camden, Arkansas.

Before the Court is the United States' Motion to Dismiss. (Doc. 28). ARC has responded. (Doc. 32). On May 12, 2005, the Court also conducted a hearing on the Motion. The Court finds this Motion ripe for consideration.

I. Background

ARC filed this lawsuit on December 12, 2002, pursuant to Sections 113(f) and 107(a) of CERCLA.

This Court stayed the case for several months while the parties conducted settlement negotiations. During the United States Supreme Court's 2004 Term, it decided *Cooper Industries, Inc. v. Aviall Services, Inc.*, U.S. ____, _____, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004). *Aviall* brought about a sea change in this lawsuit.

Aviall held that Section 113(f) of CERCLA did not authorize a party that is potentially subject to CERCLA liability, but has not been sued under Section 106 or 107(a) of CERCLA and has not resolved its liability through an administrative or judicially approved settlement, to seek contribution under CERCLA from another jointly liable party. *Aviall* left unanswered the question of whether a such a party could assert a cost recovery claim under an implied right to contribution under Section 107(a), although the majority, in dicta, suggested that the right did not exist.

After *Aviall*, ARC moved to amend its Complaint, dropping its Section 113(f) claims (because it had not been sued under Section 106 or 107(a) of CERCLA and had not resolved its liability through an administrative or judicially approved settlement) and asserting that the sole basis of its recovery against the United States was Section 107(a). This Court granted ARC's Motion to Amend, and, rather than answering ARC's Amended Complaint, the United States filed a Motion to Dismiss, arguing that ARC cannot rely on Section 107(a) to recover its cleanup costs.

II. Discussion

In ruling upon a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, the Court is required to accept the factual allegations of ARC's Amended Complaint as true and view the facts in the light most favorable to ARC. *Miller v. Pilgrim's Pride Corp.*, 366 F.2d 672, 673 (8th Cir. 2004). The Court may grant the United States' Motion only if, after so viewing the pleadings, it is patently clear that there is no set of facts that ARC could provide thereunder which would entitle it to the relief sought in the Amended Complaint. *Id.*

In its Amended Complaint, ARC alleges that it leased property at the Highland Industrial Park in Camden, Arkansas, from 1979 until October 2003.[1] Originally this leased property was part of the Shumaker Naval Ammunition Depot, which was a facility operated by the Department of Defense.[2]

ARC and the United States entered into a contract by which ARC agreed to retrofit thousands of rocket motors by removing an amonium percholrate-based propellant and replacing it with a new double-based propellant.[3] ARC used a high pressure washer system to remove the amonium percholrate-based propellants from the rocket motors, and during this process, propellant-contaminated wastewater entered the soil and groundwater.[4] Periodically, ARC also burned pieces of the propellant and, during the burning process, portions of solid

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[1] (Pl.'s Am. Compl. ¶ 7).

[2] (*Id.* ¶ 8).

[3] (*Id.* ¶ 14).

[4] (*Id.* ¶¶ 20, 24).

propellant pieces and propellant-contaminated wastewater also were released into the environment.[5]

ARC alleges that the United States is liable under CERCLA because it owned the rocket motors and operated the Camden site at the time hazardous substances were disposed from the motors and because it arranged for the transport and refurbishment of the rocket motors knowing that the generation and disposal of wastes containing hazardous substances was inherent in the refurbishment process.[6] ARC seeks an award of its response costs incurred to date under CERCLA Section 107(a) and federal common law, or both.[7]

CERCLA identifies four categories of parties responsible for cleanup costs at a contaminated facility, more commonly known as potentially responsible parties ("PRP"s):

> (1) [T]he owner or operator of . . . [the] facility,
>
> (2) [A]ny person who at the time of disposal of any hazardous substance owned or operated . . . [the] facility . . .
>
> (3) [A]ny person who . . . arranged for disposal or treatment . . . of hazardous substances . . . at the facility . . ., and
>
> (4) [A]ny person who accepts . . . hazardous substances for transport to [the facility for disposal or treatment]. *See* 42 U.S.C. § 9607(a)(1)-(4).

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[5] (*Id.* ¶¶ 25, 29).

[6] (*Id.* ¶¶ 67, 71, 75, 76).

[7] (*Id.* Prayer for Relief ¶ 2).

Section 107(a)(4)(A) and (B) make PRP's liable for:

> (A) all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan. *See* 42 U.S.C. § 9607(a)(4)(A)-(B).

As stated earlier, *Aviall* left unanswered the question of whether a PRP could assert a cost recovery claim under an implied right to contribution under Section 107(a). However, it appears the Eighth Circuit has already answered this question, holding that a PRP cannot rely on Section 107(a) to seek full cost recovery on a theory of joint and several liability from another jointly liable party; rather, a party that is subject to CERCLA liability is limited to seeking contribution from other jointly liable parties in accordance with Section 113(f), unless the PRP qualifies for one of three defenses. *Dico v. Amoco Oil Company*, 340 F.3d 525 (8th Cir. 2003). These three defenses apply if the damage resulting from contamination was due to: (1) an act of God; (2) an act of war; or (3) an act or omission of a third party other than one . . . [which] occurs in connection with a contractual relationship. . . ." *Id.* at 531, *citing* 28 U.S.C. § 9607(b). The defenses are available because "when one of the enumerated CERCLA defenses applies a PRP is deemed innocent; and an action between an innocent party and another PRP is not between two liable parties." *Id.*

ARC does not dispute that it and the United States are PRPs or argue that it is eligible for any of these

three defenses. Therefore, existing precedent appears to preclude ARC's Section 107(a) claims against ARC.

ARC acknowledges this precedent but argues that *Aviall* has undermined the fundamental support for *Dico* and other circuits' decisions that Section 113(f) limits PRP's claims for contribution and precludes actions between PRPs for direct recovery under Section 107(a). ARC's position finds support from some district courts who have passed on this issue. *See Vine Street LLC v. Keeling*, 362 F. Supp. 2d 754 (E.D. Tex. 2005) (holding despite *Aviall* and existing circuit precedent, PRP can bring a claim under Section 107(a) when it cannot meet the specific requirements of Section 113(f)(1)); *Metropolitan Water Reclamation District of Greater Chicago v. Lake River Corp.*, 365 F. Supp. 2d 913 (N.D. Ill. 2005) (same). *See also Syms v. Olin Corp.*, ____ F.3d ____, 2005 WL 1164011, *8 n.8 (2nd Cir. 2005) (recognizing in dicta that *Aviall* combined with existing Second Circuit precedent would leave a PRP with no mechanism for recovering response costs until proceedings are brought against the PRP; expressing opinion that such a result "would create a perverse incentive for PRPs to wait until they are sued before incurring response costs").

In contrast, other district courts confronted with this issue have found that *Aviall*, combined with existing precedent, effectively precludes an implied cause of action pursuant to CERCLA Section 107(a). *See City of Waukesha v. Viacom Int'l, Inc.*, 362 F. Supp. 2d 1025 (E.D. Wis. 2005) (denying plaintiff's motion to amend as futile, finding *Aviall* did not vacate Seventh Circuit precedent that held landowner who was a party liable in some measure for the contamination must seek contribu-

tion under § 113(f)); *Mercury Mall Assoc. v. Nick's Market, Inc.*, _____ F. Supp. 2d _____, No. Civ. A. 4:04CV80, 2005 WL 1017855, *5 (E.D. Va. Feb, 28, 2005) (denying plaintiff's motion to amend, recognizing that although result was quixotic, the combined result of *Aviall* and existing precedent precluded implied right of contribution under 107(a) and left PRP without a remedy); *Elementis Chems., Inc. v. TH Agric. & Nutrition, LLC*, No. 03 Civ. 5150 (LBS), 2005 WL 236488 (S.D.N.Y. Jan. 31, 2005) (finding a PRP without defense to damages precluded from bringing 107(a) cost recovery action following *Aviall*).

This Court agrees with the logic that the holdings of existing Eighth Circuit precedent and *Aviall* leave a party in ARC's position without a remedy. *Aviall* specifically declined to address the issue of whether as an alternative to an action for contribution under Section 113(f)(1), a PRP could recover costs under Section 107(a). *Aviall*, 125 S.Ct. at 586. *Aviall* does not undermine the Eighth Circuit precedent in *Dico*, precedent that this Court is bound to follow. *See Hood v. U.S.*, 342 F.3d 861, 864 (8th Cir. 2003) (holding district court in Eighth Circuit is bound to apply to the precedent of the Eighth Circuit Court of Appeals); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 838 (8th Cir. 2001) (holding panel of court of appeals cannot overrule another panel unless the earlier panel decision is cast into doubt by a decision of the Supreme Court). The Court recognizes that the result reached in this Order is patently unfair to ARC, because it has voluntarily cleaned up environmental contamination, yet it is left without a CERCLA remedy against the United States, another PRP. Perhaps the Eighth Circuit will give attention to these consequences if it considers the holding of *Dico*.

III. Conclusion

Based on the foregoing, the Court finds the Motion to Dismiss should be and hereby is **granted**. An Order of even date consistent with this Opinion shall issue.

IT IS SO ORDERED this 31 day of May, 2005.

/s/ HARRY F. BARNES
HON. HARRY F. BARNES
U.S. District Judge

APPENDIX C

1. 42 U.S.C. 9607 provides:

Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

(c) Determination of amounts

(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of

a hazardous substance or incident involving release of a hazardous substance shall not exceed—

(A) for any vessel, other than an incineration vessel, which carries any hazardous substance as cargo or residue, $300 per gross ton, or $5,000,000, whichever is greater;

(B) for any other vessel, other than an incineration vessel, $300 per gross ton, or $500,000, whichever is greater;

(C) for any motor vehicle, aircraft, hazardous liquid pipeline facility (as defined in section 60101(a) of Title 49), or rolling stock, $50,000,000 or such lesser amount as the President shall establish by regulation, but in no event less than $5,000,000 (or, for releases of hazardous substances as defined in section 9601(14)(A) of this title into the navigable waters, $8,000,000). Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or

(D) for any incineration vessel or any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus $50,000,000 for any damages under this subchapter.

(2) Notwithstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if (A)(i) the release or threat of release of a hazardous substance was the result of willful misconduct or willful negligence

within the privity or knowledge of such person, or (ii) the primary cause of the release was a violation (within the privity or knowledge of such person) of applicable safety, construction, or operating standards or regulations; or (B) such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under the national contingency plan with respect to regulated carriers subject to the provisions of Title 49 or vessels subject to the provisions of Title 33, 46, or 46 Appendix, subparagraph (A)(ii) of this paragraph shall be deemed to refer to Federal standards or regulations.

(3) If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 9612(c) of this title. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.

(d) Rendering care or advice

(1) In general

Except as provided in paragraph (2), no person shall be liable under this subchapter for costs or

damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan ("NCP") or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.

(2) State and local governments

No State or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

(3) Savings provision

This subsection shall not alter the liability of any person covered by the provisions of paragraph (1), (2), (3), or (4) of subsection (a) of this section with respect to the release or threatened release concerned.

(e) Indemnification, hold harmless, etc., agreements or conveyances; subrogation rights

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

(f) Natural resources liability; designation of public trustees of natural resources

(1) Natural resources liability

In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust

restriction on alienation: *Provided, however,* That no liability to the United States or State or Indian tribe shall be imposed under subparagraph (C) of subsection (a) of this section, where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe. The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) of this section shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this chapter for natural resource damages,

including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource. There shall be no recovery under the authority of subparagraph (C) of subsection (a) of this section where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.

(2) Designation of Federal and State officials

(A) Federal

The President shall designate in the National Contingency Plan published under section 9605 of this title the Federal officials who shall act on behalf of the public as trustees for natural resources under this chapter and section 1321 of Title 33. Such officials shall assess damages for injury to, destruction of, or loss of natural resources for purposes of this chapter and such section 1321 of Title 33 for those resources under their trusteeship and may, upon request of and reimbursement from a State and at the Federal officials' discretion, assess damages for those natural resources under the State's trusteeship.

(B) State

The Governor of each State shall designate State officials who may act on behalf of the public as trustees for natural resources under this chapter and section 1321 of Title 33 and shall notify the President of such designations. Such State officials shall assess damages to natural resources for the purposes of this

chapter and such section 1321 of Title 33 for those natural resources under their trusteeship.

(C) Rebuttable presumption

Any determination or assessment of damages to natural resources for the purposes of this chapter and section 1321 of Title 33 made by a Federal or State trustee in accordance with the regulations promulgated under section 9651(c) of this title shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this chapter or section 1321 of Title 33.

(g) Federal agencies

For provisions relating to Federal agencies, see section 9620 of this title.

(h) Owner or operator of vessel

The owner or operator of a vessel shall be liable in accordance with this section, under maritime tort law, and as provided under section 9614 of this title notwithstanding any provision of the Act of March 3, 1851 (46 U.S.C. 183ff) [46 App. U.S.C. 182, 183, 184-188] or the absence of any physical damage to the proprietary interest of the claimant.

(i) Application of a registered pesticide product

No person (including the United States or any State or Indian tribe) may recover under the authority of this section for any response costs or damages resulting from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and

Rodenticide Act [7 U.S.C. 136 et seq.]. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance.

(j) Obligations or liability pursuant to federally permitted release

Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance. In addition, costs of response incurred by the Federal Government in connection with a discharge specified in section 9601(10)(B) or (C) of this title shall be recoverable in an action brought under section 1319(b) of Title 33.

(k) Transfer to, and assumption by, Post-Closure Liability Fund of liability of owner or operator of hazardous waste disposal facility in receipt of permit under applicable solid waste disposal law; time, criteria applicable, procedures, etc.; monitoring costs; reports

(1) The liability established by this section or any other law for the owner or operator of a hazardous waste disposal facility which has received a permit under subtitle C of the Solid Waste Disposal Act [42 U.S.C. 6921 et seq.], shall be transferred to and assumed by the Post-closure Liability Fund established by section 9641 of this title when—

(A) such facility and the owner and operator thereof has complied with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C. 6921 et seq.] and regulations issued thereunder, which may affect the performance of such facility after closure; and

(B) such facility has been closed in accordance with such regulations and the conditions of such permit, and such facility and the surrounding area have been monitored as required by such regulations and permit conditions for a period not to exceed five years after closure to demonstrate that there is no substantial likelihood that any migration offsite or release from confinement of any hazardous substance or other risk to public health or welfare will occur.

(2) Such transfer of liability shall be effective ninety days after the owner or operator of such facility notifies the Administrator of the Environmental Protection Agency (and the State where it has an authorized program under section 3006(b) of the Solid Waste Disposal Act [42 U.S.C. 6926(b)]) that the conditions imposed by this subsection have been satisfied. If within such ninety-day period the Administrator of the Environmental Protection Agency or such State

determines that any such facility has not complied with all the conditions imposed by this subsection or that insufficient information has been provided to demonstrate such compliance, the Administrator or such State shall so notify the owner and operator of such facility and the administrator of the Fund established by section 9641 of this title, and the owner and operator of such facility shall continue to be liable with respect to such facility under this section and other law until such time as the Administrator and such State determines that such facility has complied with all conditions imposed by this subsection. A determination by the Administrator or such State that a facility has not complied with all conditions imposed by this subsection or that insufficient information has been supplied to demonstrate compliance, shall be a final administrative action for purposes of judicial review. A request for additional information shall state in specific terms the data required.

(3) In addition to the assumption of liability of owners and operators under paragraph (1) of this subsection, the Post-closure Liability Fund established by section 9641 of this title may be used to pay costs of monitoring and care and maintenance of a site incurred by other persons after the period of monitoring required by regulations under subtitle C of the Solid Waste Disposal Act [42 U.S.C. 6921 et seq.] for hazardous waste disposal facilities meeting the conditions of paragraph (1) of this subsection.

(4)(A) Not later than one year after December 11, 1980, the Secretary of the Treasury shall conduct a study and shall submit a report thereon to the Congress on the feasibility of establishing or qualifying an optional system of private insurance for postclosure

financial responsibility for hazardous waste disposal facilities to which this subsection applies. Such study shall include a specification of adequate and realistic minimum standards to assure that any such privately placed insurance will carry out the purposes of this subsection in a reliable, enforceable, and practical manner. Such a study shall include an examination of the public and private incentives, programs, and actions necessary to make privately placed insurance a practical and effective option to the financing system for the Post-closure Liability Fund provided in subchapter II of this chapter.

(B) Not later than eighteen months after December 11, 1980, and after a public hearing, the President shall by rule determine whether or not it is feasible to establish or qualify an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. If the President determines the establishment or qualification of such a system would be infeasible, he shall promptly publish an explanation of the reasons for such a determination. If the President determines the establishment or qualification of such a system would be feasible, he shall promptly publish notice of such determination. Not later than six months after an affirmative determination under the preceding sentence and after a public hearing, the President shall by rule promulgate adequate and realistic minimum standards which must be met by any such privately placed insurance, taking into account the purposes of this chapter and this subsection. Such rules shall also specify reasonably expeditious procedures by which privately placed insurance plans can qualify as meeting such minimum standards.

(C) In the event any privately placed insurance plan qualifies under subparagraph (B), any person enrolled in, and complying with the terms of, such plan shall be excluded from the provisions of paragraphs (1), (2), and (3) of this subsection and exempt from the requirements to pay any tax or fee to the Post-closure Liability Fund under subchapter II of this chapter.

(D) The President may issue such rules and take such other actions as are necessary to effectuate the purposes of this paragraph.

(5) SUSPENSION OF LIABILITY TRANSFER.—Notwithstanding paragraphs (1), (2), (3), and (4) of this subsection and subsection (j) of section 9611 of this title, no liability shall be transferred to or assumed by the Post-Closure Liability Trust Fund established by section 9641 of this title prior to completion of the study required under paragraph (6) of this subsection, transmission of a report of such study to both Houses of Congress, and authorization of such a transfer or assumption by Act of Congress following receipt of such study and report.

(6) STUDY OF OPTIONS FOR POST-CLOSURE PROGRAM.—

(A) STUDY.—The Comptroller General shall conduct a study of options for a program for the management of the liabilities associated with hazardous waste treatment, storage, and disposal sites after their closure which complements the policies set forth in the Hazardous and Solid Waste Amendments of 1984 and assures the protection of human health and the environment.

(B) PROGRAM ELEMENTS.—The program referred to in subparagraph (A) shall be designed to assure each of the following:

(i) Incentives are created and maintained for the safe management and disposal of hazardous wastes so as to assure protection of human health and the environment.

(ii) Members of the public will have reasonable confidence that hazardous wastes will be managed and disposed of safely and that resources will be available to address any problems that may arise and to cover costs of long-term monitoring, care, and maintenance of such sites.

(iii) Persons who are or seek to become owners and operators of hazardous waste disposal facilities will be able to manage their potential future liabilities and to attract the investment capital necessary to build, operate, and close such facilities in a manner which assures protection of human health and the environment.

(C) ASSESSMENTS.—The study under this paragraph shall include assessments of treatment, storage, and disposal facilities which have been or are likely to be issued a permit under section 3005 of the Solid Waste Disposal Act [42 U.S.C. 6925] and the likelihood of future insolvency on the part of owners and operators of such facilities. Separate assessments shall be made for different classes of facilities and for different classes of land disposal facilities and shall include but not be limited to—

(i) the current and future financial capabilities of facility owners and operators;

(ii) the current and future costs associated with facilities, including the costs of routine monitoring and maintenance, compliance monitoring, corrective action, natural resource damages, and liability for damages to third parties; and

(iii) the availability of mechanisms by which owners and operators of such facilities can assure that current and future costs, including post-closure costs, will be financed.

(D) PROCEDURES.—In carrying out the responsibilities of this paragraph, the Comptroller General shall consult with the Administrator, the Secretary of Commerce, the Secretary of the Treasury, and the heads of other appropriate Federal agencies.

(E) CONSIDERATION OF OPTIONS.—In conducting the study under this paragraph, the Comptroller General shall consider various mechanisms and combinations of mechanisms to complement the policies set forth in the Hazardous and Solid Waste Amendments of 1984 to serve the purposes set forth in subparagraph (B) and to assure that the current and future costs associated with hazardous waste facilities, including post-closure costs, will be adequately financed and, to the greatest extent possible, borne by the owners and operators of such facilities. Mechanisms to be considered include, but are not limited to—

(i) revisions to closure, post-closure, and financial responsibility requirements under sub-

titles C and I of the Solid Waste Disposal Act [42 U.S.C. 6921 et seq. and 6991 et seq.];

(ii) voluntary risk pooling by owners and operators;

(iii) legislation to require risk pooling by owners and operators;

(iv) modification of the Post-Closure Liability Trust Fund previously established by section 9641 of this title, and the conditions for transfer of liability under this subsection, including limiting the transfer of some or all liability under this subsection only in the case of insolvency of owners and operators;

(v) private insurance;

(vi) insurance provided by the Federal Government;

(vii) coinsurance, reinsurance, or pooled-risk insurance, whether provided by the private sector or provided or assisted by the Federal Government; and

(viii) creation of a new program to be administered by a new or existing Federal agency or by a federally chartered corporation.

(F) RECOMMENDATIONS.—The Comptroller General shall consider options for funding any program under this section and shall, to the extent necessary, make recommendations to the appro-

priate committees of Congress for additional authority to implement such program.

(*l*) Federal lien

(1) In general

All costs and damages for which a person is liable to the United States under subsection (a) of this section (other than the owner or operator of a vessel under paragraph (1) of subsection (a) of this section) shall constitute a lien in favor of the United States upon all real property and rights to such property which—

(A) belong to such person; and

(B) are subject to or affected by a removal or remedial action.

(2) Duration

The lien imposed by this subsection shall arise at the later of the following:

(A) The time costs are first incurred by the United States with respect to a response action under this chapter.

(B) The time that the person referred to in paragraph (1) is provided (by certified or registered mail) written notice of potential liability.

Such lien shall continue until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable

through operation of the statute of limitations provided in section 9613 of this title.

(3) Notice and validity

The lien imposed by this subsection shall be subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of the lien has been filed in the appropriate office within the State (or county or other governmental subdivision), as designated by State law, in which the real property subject to the lien is located. Any such purchaser, holder of a security interest, or judgment lien creditor shall be afforded the same protections against the lien imposed by this subsection as are afforded under State law against a judgment lien which arises out of an unsecured obligation and which arises as of the time of the filing of the notice of the lien imposed by this subsection. If the State has not by law designated one office for the receipt of such notices of liens, the notice shall be filed in the office of the clerk of the United States district court for the district in which the real property is located. For purposes of this subsection, the terms "purchaser" and "security interest" shall have the definitions provided under section 6323(h) of Title 26.

(4) Action in rem

The costs constituting the lien may be recovered in an action in rem in the United States district court for the district in which the removal or remedial action is occurring or has occurred. Nothing in this

subsection shall affect the right of the United States to bring an action against any person to recover all costs and damages for which such person is liable under subsection (a) of this section.

(m) Maritime lien

All costs and damages for which the owner or operator of a vessel is liable under subsection (a)(1) of this section with respect to a release or threatened release from such vessel shall constitute a maritime lien in favor of the United States on such vessel. Such costs may be recovered in an action in rem in the district court of the United States for the district in which the vessel may be found. Nothing in this subsection shall affect the right of the United States to bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(n) Liability of fiduciaries

(1) In general

The liability of a fiduciary under any provision of this chapter for the release or threatened release of a hazardous substance at, from, or in connection with a vessel or facility held in a fiduciary capacity shall not exceed the assets held in the fiduciary capacity.

(2) Exclusion

Paragraph (1) does not apply to the extent that a person is liable under this chapter independently of the person's ownership of a vessel or facility as a fiduciary or actions taken in a fiduciary capacity.

(3) Limitation

Paragraphs (1) and (4) do not limit the liability pertaining to a release or threatened release of a hazardous substance if negligence of a fiduciary causes or contributes to the release or threatened release.

(4) Safe harbor

A fiduciary shall not be liable in its personal capacity under this chapter for—

(A) undertaking or directing another person to undertake a response action under subsection (d)(1) of this section or under the direction of an on scene coordinator designated under the National Contingency Plan;

(B) undertaking or directing another person to undertake any other lawful means of addressing a hazardous substance in connection with the vessel or facility;

(C) terminating the fiduciary relationship;

(D) including in the terms of the fiduciary agreement a covenant, warranty, or other term or condition that relates to compliance with an environmental law, or monitoring, modifying or enforcing the term or condition;

(E) monitoring or undertaking 1 or more inspections of the vessel or facility;

(F) providing financial or other advice or counseling to other parties to the fiduciary relationship, including the settlor or beneficiary;

(G) restructuring, renegotiating, or otherwise altering the terms and conditions of the fiduciary relationship;

(H) administering, as a fiduciary, a vessel or facility that was contaminated before the fiduciary relationship began; or

(I) declining to take any of the actions described in subparagraphs (B) through (H).

(5) Definitions

As used in this chapter:

(A) Fiduciary

The term "fiduciary"—

(i) means a person acting for the benefit of another party as a bona fide—

(I) trustee;

(II) executor;

(III) administrator;

(IV) custodian;

(V) guardian of estates or guardian ad litem;

(VI) receiver;

(VII) conservator;

(VIII) committee of estates of incapacitated persons;

(IX) personal representative;

(X) trustee (including a successor to a trustee) under an indenture agreement, trust agreement, lease, or similar financing agreement, for debt securities, certificates of interest or certificates of participation in debt securities, or other forms of indebtedness as to which the trustee is not, in the capacity of trustee, the lender; or

(XI) representative in any other capacity that the Administrator, after providing public notice, determines to be similar to the capacities described in subclauses (I) through (X); and

(ii) does not include—

(I) a person that is acting as a fiduciary with respect to a trust or other fiduciary estate that was organized for the primary purpose of, or is engaged in, actively carrying on a trade or business for profit, unless the trust or other fiduciary estate was created as part of, or to facilitate, 1 or more estate plans or because of the incapacity of a natural person; or

(II) a person that acquires ownership or control of a vessel or facility with the objective purpose of avoiding liability of the person or of any other person.

(B) Fiduciary capacity

The term "fiduciary capacity" means the capacity of a person in holding title to a vessel or facility, or otherwise having control of or an interest in the vessel or facility, pursuant to the exercise of the responsibilities of the person as a fiduciary.

(6) Savings clause

Nothing in this subsection—

(A) affects the rights or immunities or other defenses that are available under this chapter or other law that is applicable to a person subject to this subsection; or

(B) creates any liability for a person or a private right of action against a fiduciary or any other person.

(7) No effect on certain persons

Nothing in this subsection applies to a person if the person—

(A)(i) acts in a capacity other than that of a fiduciary or in a beneficiary capacity; and

(ii) in that capacity, directly or indirectly benefits from a trust or fiduciary relationship; or

(B)(i) is a beneficiary and a fiduciary with respect to the same fiduciary estate; and

(ii) as a fiduciary, receives benefits that exceed customary or reasonable compensation, and incidental benefits, permitted under other applicable law.

(8) Limitation

This subsection does not preclude a claim under this chapter against—

(A) the assets of the estate or trust administered by the fiduciary; or

(B) a nonemployee agent or independent contractor retained by a fiduciary.

(*o*) De micromis exemption

(1) In general

Except as provided in paragraph (2), a person shall not be liable, with respect to response costs at a facility on the National Priorities List, under this chapter if liability is based solely on paragraph (3) or (4) of subsection (a), and the person, except as provided in paragraph (4) of this subsection, can demonstrate that—

(A) the total amount of the material containing hazardous substances that the person arranged for disposal or treatment of, arranged with a transporter for transport for disposal or treatment of, or accepted for transport for disposal or treatment, at the facility was less than 110 gallons of liquid materials or less than 200 pounds of solid materials (or such greater or lesser amounts as the Administrator may determine by regulation); and

(B) all or part of the disposal, treatment, or transport concerned occurred before April 1, 2001.

(2) Exceptions

Paragraph (1) shall not apply in a case in which—

(A) the President determines that—

(i) the materials containing hazardous substances referred to in paragraph (1) have contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration with respect to the facility; or

(ii) the person has failed to comply with an information request or administrative subpoena issued by the President under this chapter or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the facility; or

(B) a person has been convicted of a criminal violation for the conduct to which the exemption would apply, and that conviction has not been vitiated on appeal or otherwise.

(3) No judicial review

A determination by the President under paragraph (2)(A) shall not be subject to judicial review.

(4) NonGovernmental third-party contribution actions

In the case of a contribution action, with respect to response costs at a facility on the National Priorities List, brought by a party, other than a Federal, State, or local government, under this chapter, the burden of proof

shall be on the party bringing the action to demonstrate that the conditions described in paragraph (1)(A) and (B) of this subsection are not met.

(p) Municipal solid waste exemption

(1) In general

Except as provided in paragraph (2) of this subsection, a person shall not be liable, with respect to response costs at a facility on the National Priorities List, under paragraph (3) of subsection (a) of this section for municipal solid waste disposed of at a facility if the person, except as provided in paragraph (5) of this subsection, can demonstrate that the person is—

(A) an owner, operator, or lessee of residential property from which all of the person's municipal solid waste was generated with respect to the facility;

(B) a business entity (including a parent, subsidiary, or affiliate of the entity) that, during its 3 taxable years preceding the date of transmittal of written notification from the President of its potential liability under this section, employed on average not more than 100 full-time individuals, or the equivalent thereof, and that is a small business concern (within the meaning of the Small Business Act (15 U.S.C. 631 et seq.)) from which was generated all of the municipal solid waste attributable to the entity with respect to the facility; or

(C) an organization described in section 501(c)(3) of Title 26 and exempt from tax under

section 501(a) of Title 26 that, during its taxable year preceding the date of transmittal of written notification from the President of its potential liability under this section, employed not more than 100 paid individuals at the location from which was generated all of the municipal solid waste attributable to the organization with respect to the facility.

For purposes of this subsection, the term "affiliate" has the meaning of that term provided in the definition of "small business concern" in regulations promulgated by the Small Business Administration in accordance with the Small Business Act (15 U.S.C. 631 et seq.).

(2) Exception

Paragraph (1) shall not apply in a case in which the President determines that—

(A) the municipal solid waste referred to in paragraph (1) has contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration with respect to the facility;

(B) the person has failed to comply with an information request or administrative subpoena issued by the President under this chapter; or

(C) the person has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the facility.

(3) No judicial review

A determination by the President under paragraph (2) shall not be subject to judicial review.

(4) Definition of municipal solid waste

(A) In general

For purposes of this subsection, the term "municipal solid waste" means waste material—

(i) generated by a household (including a single or multifamily residence); and

(ii) generated by a commercial, industrial, or institutional entity, to the extent that the waste material—

(I) is essentially the same as waste normally generated by a household;

(II) is collected and disposed of with other municipal solid waste as part of normal municipal solid waste collection services; and

(III) contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste material generated by a typical single-family household.

(B) Examples

Examples of municipal solid waste under subparagraph (A) include food and yard waste, paper, clothing, appliances, consumer product packaging, disposable diapers, office supplies, cosmetics, glass and metal food containers, elementary or secondary school science laboratory waste, and household hazardous waste.

(C) Exclusions

The term "municipal solid waste" does not include—

(i) combustion ash generated by resource recovery facilities or municipal incinerators; or

(ii) waste material from manufacturing or processing operations (including pollution control operations) that is not essentially the same as waste normally generated by households.

(5) Burden of proof

In the case of an action, with respect to response costs at a facility on the National Priorities List, brought under this section or section 9613 of this title by—

(A) a party, other than a Federal, State, or local government, with respect to municipal solid waste disposed of on or after April 1, 2001; or

(B) any party with respect to municipal solid waste disposed of before April 1, 2001, the burden of proof shall be on the party bringing the action to demonstrate that the conditions described in paragraphs (1) and (4) for exemption for entities and organizations described in paragraph (1)(B) and (C) are not met.

(6) Certain actions not permitted

No contribution action may be brought by a party, other than a Federal, State, or local government, under this chapter with respect to circumstances described in paragraph (1)(A).

(7) Costs and fees

A nongovernmental entity that commences, after the date of the enactment of this subsection, a contribution action under this chapter shall be liable to

the defendant for all reasonable costs of defending the action, including all reasonable attorney's fees and expert witness fees, if the defendant is not liable for contribution based on an exemption under this subsection or subsection (o) of this section.

(q) Contiguous properties

(1) Not considered to be an owner or operator

(A) In general

A person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered to be an owner or operator of a vessel or facility under paragraph (1) or (2) of subsection (a) solely by reason of the contamination if—

(i) the person did not cause, contribute, or consent to the release or threatened release;

(ii) the person is not—

(I) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services); or

(II) the result of a reorganization of a business entity that was potentially liable;

(iii) the person takes reasonable steps to—

(I) stop any continuing release;

(II) prevent any threatened future release; and

(III) prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person;

(iv) the person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility);

(v) the person—

(I) is in compliance with any land use restrictions established or relied on in connection with the response action at the facility; and

(II) does not impede the effectiveness or integrity of any institutional control employed in connection with a response action;

(vi) the person is in compliance with any request for information or administrative subpoena issued by the President under this chapter;

(vii) the person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility; and

(viii) At the time at which the person acquired the property, the person

(I) conducted all appropriate inquiry within the meaning of section 9601(35)(B) of this title with respect to the property; and

(II) did not know or have reason to know that the property was or could be contaminated by a release or threatened release of one or more hazardous substances from other real property not owned or operated by the person.

(B) Demonstration

To qualify as a person described in subparagraph (A), a person must establish by a preponderance of the evidence that the conditions in clauses (i) through (viii) of subparagraph (A) have been met.

(C) Bona fide prospective purchaser

Any person that does not qualify as a person described in this paragraph because the person had, or had reason to have, knowledge specified in subparagraph (A)(viii) at the time of acquisition of the real property may qualify as a bona fide prospective purchaser under section 9601(40) of this title if the person is otherwise described in that section.

(D) Ground water

With respect to a hazardous substance from one or more sources that are not on the property of a person that is a contiguous property owner that enters ground water beneath the property of the person solely as a result of subsurface migration in

an aquifer, subparagraph (A)(iii) shall not require the person to conduct ground water investigations or to install ground water remediation systems, except in accordance with the policy of the Environmental Protection Agency concerning owners of property containing contaminated aquifers, dated May 24, 1995.

(2) Effect of law

With respect to a person described in this subsection, nothing in this subsection—

(A) limits any defense to liability that may be available to the person under any other provision of law; or

(B) imposes liability on the person that is not otherwise imposed by subsection (a) of this section.

(3) Assurances

The Administrator may—

(A) issue an assurance that no enforcement action under this chapter will be initiated against a person described in paragraph (1); and

(B) grant a person described in paragraph (1) protection against a cost recovery or contribution action under section 9613(f) of this title.

(r) Prospective purchaser and windfall lien

(1) Limitation on liability

Notwithstanding subsection (a)(1) of this section, a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility shall not be liable as

long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

(2) Lien

If there are unrecovered response costs incurred by the United States at a facility for which an owner of the facility is not liable by reason of paragraph (1), and if each of the conditions described in paragraph (3) is met, the United States shall have a lien on the facility, or may by agreement with the owner, obtain from the owner a lien on any other property or other assurance of payment satisfactory to the Administrator, for the unrecovered response costs.

(3) Conditions

The conditions referred to in paragraph (2) are the following:

(A) Response action

A response action for which there are unrecovered costs of the United States is carried out at the facility.

(B) Fair market value

The response action increases the fair market value of the facility above the fair market value of the facility that existed before the response action was initiated.

(4) Amount; duration

A lien under paragraph (2)—

(A) shall be in an amount not to exceed the increase in fair market value of the property

attributable to the response action at the time of a sale or other disposition of the property;

(B) shall arise at the time at which costs are first incurred by the United States with respect to a response action at the facility;

(C) shall be subject to the requirements of subsection (l)(3); and

(D) shall continue until the earlier of—

(i) satisfaction of the lien by sale or other means; or

(ii) notwithstanding any statute of limitations under section 9613 of this tile, recovery of all response costs incurred at the facility.

2. 42 U.S.C. 9613 provides:

Civil proceedings

(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia

Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Jurisdiction; venue

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) Controversies or other matters resulting from tax collection or tax regulation review

The provisions of subsections (a) and (b) of this section shall not apply to any controversy or other matter resulting from the assessment of collection of any tax, as provided by subchapter II of this chapter, or to the review of any regulation promulgated under Title 26.

(d) Litigation commenced prior to December 11, 1980

No provision of this chapter shall be deemed or held to moot any litigation concerning any release of any hazardous substance, or any damages associated therewith, commenced prior to December 11, 1980.

(e) Nationwide service of process

In any action by the United States under this chapter, process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for the service of process.

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) Period in which action may be brought

(1) Actions for natural resource damages

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance

activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after—

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation

No action based on rights subrogated pursuant to this section by reason of payment of a claim may be

commenced under this subchapter more than 3 years after the date of payment of such claim.

(5) Actions to recover indemnification payments

Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 9619 of this title, an action under section 9607 of this title for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) Minors and incompetents

The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

(h) Timing of review

No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or

remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 9606(b)(2) of this title.

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

(i) Intervention

In any action commenced under this chapter or under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State

shows that the person's interest is adequately represented by existing parties.

(j) Judicial review

(1) Limitation

In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) Standard

In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

(3) Remedy

If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award (A) only the response costs or damages that are not inconsistent with the national contingency plan, and (B) such other relief as is consistent with the National Contingency Plan.

(4) Procedural errors

In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were

so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made.

(k) Administrative record and participation procedures

(1) Administrative record

The President shall establish an administrative record upon which the President shall base the selection of a response action. The administrative record shall be available to the public at or near the facility at issue. The President also may place duplicates of the administrative record at any other location.

(2) Participation procedures

(A) Removal action

The President shall promulgate regulations in accordance with chapter 5 of Title 5 establishing procedures for the appropriate participation of interested persons in the development of the administrative record on which the President will base the selection of removal actions and on which judicial review of removal actions will be based.

(B) Remedial action

The President shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the President will base the selection of remedial actions and on which judicial review of remedial actions will be based. The procedures developed under this subparagraph shall include, at a minimum, each of the following:

(i) Notice to potentially affected persons and the public, which shall be accompanied by a brief analysis of the plan and alternative plans that were considered.

(ii) A reasonable opportunity to comment and provide information regarding the plan.

(iii) An opportunity for a public meeting in the affected area, in accordance with section 9617(a)(2) of this title (relating to public participation).

(iv) A response to each of the significant comments, criticisms, and new data submitted in written or oral presentations.

(v) A statement of the basis and purpose of the selected action.

For purposes of this subparagraph, the administrative record shall include all items developed and received under this subparagraph and all items described in the second sentence of section 9617(d) of this title. The President shall promulgate regu lations in accordance with chapter 5 of Title 5 to carry out the requirements of this subparagraph.

(C) Interim record

Until such regulations under subparagraphs (A) and (B) are promulgated, the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action, including procedures for the participation of interested parties and the public. The development of an administrative record and the

selection of response action under this chapter shall not include an adjudicatory hearing.

(D) Potentially responsible parties

The President shall make reasonable efforts to identify and notify potentially responsible parties as early as possible before selection of a response action. Nothing in this paragraph shall be construed to be a defense to liability.

(*l*) Notice of actions

Whenever any action is brought under this chapter in a court of the United States by a plaintiff other than the United States, the plaintiff shall provide a copy of the complaint to the Attorney General of the United States and to the Administrator of the Environmental Protection Agency.

(3)

No. 06-562

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC RESEARCH CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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UNITED STATES OF AMERICA, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. Respondent concedes that the Court should grant review in this case to resolve the circuit conflict over the question whether a potentially responsible party (PRP) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, that is not eligible to bring an action for contribution under Section 113(f) of CERCLA, 42 U.S.C. 9613(f), may nevertheless bring an action against another PRP under Section 107(a), 42 U.S.C. 9607(a). Respondent contends only that, in the event the Court grants review, it should also consider, as an alternative ground for affirmance, the argument that respondent *was* eligible to bring an action for contribution against the government under Section 113(f), on the theory that, even if respondent lacked a cause of action against the government under Section 107(a), it could pursue a request for *declaratory relief* under Section 107(a) (and

thereby trigger the right to bring a claim under Section 113(f)). That argument, however, has been forfeited because respondent failed properly to preserve it below. In the district court, respondent expressly dropped its claim under Section 113(f) in the wake of this Court's decision in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004). See Mot. for Leave to File Am. Compl. 2 (stating that, "[u]nder [*Cooper Industries*], the Section 113(f)(1) claim may no longer be maintained"). Accordingly, the district court held only that respondent did not have a cause of action under Section 107(a). Pet. App. 21a-28a. In the court of appeals, moreover, respondent did not advance this argument until its reply brief, and the court of appeals did not address it. See, *e.g.*, *Navarijo-Barrios* v. *Ashcroft*, 322 F.3d 561, 564 n.1 (8th Cir. 2003) (stating that "[i]t is well settled that we do not consider arguments raised for the first time in a reply brief"). In the event the Court grants review in this case, therefore, it need not consider respondent's alternative argument.

In any event, that argument plainly lacks merit. As the petition demonstrates (Pet. 15-23), Section 107(a) does not afford a cause of action for one PRP to sue another PRP. If that understanding of the scope of Section 107(a) is correct, it necessarily follows that a PRP cannot pursue a claim *for declaratory relief* against another PRP under Section 107(a). As even respondent concedes (Br. in Opp. 8 n.2), the Declaratory Judgment Act is purely procedural and remedial in nature, see *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); it cannot supply a substantive cause of action where none exists. Thus, if PRPs are not within the class of parties entitled to sue for the relief afforded by Section 107(a), they cannot by sleight-of-hand overcome

that fundamental flaw by seeking declaratory relief under the same provision. See *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust for So. Cal.*, 463 U.S. 1, 27 (1983).

Even assuming *arguendo* that one PRP could request a declaration that another party was a PRP in some circumstances, therefore, such a request would not arise under Section 107(a) and thus could not constitute "[a] civil action under [Section 107(a)]" so as to trigger the right to bring suit under Section 113(f). *Franchise Tax Bd.*, 463 U.S. at 27; cf. *Cooper Industries*, 543 U.S. at 160-161 (stating question presented as "whether a private party who has not been sued under § 106 or § 107(a) may nevertheless obtain contribution under § 113(f)(1) from other liable parties"). A contrary reading of Section 113(f) would effectively render superfluous the statutory requirement that a PRP may bring a claim for contribution only "during or following" an action under Section 106 or Section 107(a), by enabling a PRP to manufacture a qualifying Section 107(a) action through the simple expedient of including a request for declaratory relief. Nothing in CERCLA, or the case law interpreting it, supports such a peculiar result.

2. This Court has before it three petitions involving the same principal question: *i.e.*, whether a potentially responsible party can pursue an action against another PRP under Section 107(a). See *E.I. du Pont de Nemours & Co.* v. *United States*, petition for cert. pending, No. 06-726 (filed Nov. 21, 2006) (*DuPont*); *UGI Utilities, Inc.* v. *Consolidated Edison Co. of New York, Inc.*, petition for cert. pending, No. 05-1323 (filed Apr. 14, 2006).[1]

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[1] In all of those cases, the courts of appeals held, as a categorical matter, that a PRP either could or could not sue another PRP under

It now appears that all three petitions will be considered together at the Court's January 19 Conference. Accordingly, because this case squarely presents all relevant aspects of the question that has divided the circuits, the petition for a writ of certiorari should be granted. The later-filed petition in *DuPont* also would be an appropriate vehicle for resolving the question presented, so the Court may wish to grant certiorari in that case as well. As explained at greater length in the government's brief in *UGI*, however, the petition in *UGI* would constitute a less suitable vehicle than either this case or *DuPont* in which to resolve the circuit conflict. First, in light of the arguments that have been advanced by the respondent in *UGI* (see 05-1323 Resp. Supp. Br. 3-9), that case now clearly presents additional (and complex) factual and legal questions concerning the precise parameters of the cause of action for contribution under another provision of CERCLA, Section 113(f)(3)(B)—questions that are not independently worthy of review and over which there is at present no disagreement among the circuits.

Section 107(a), without drawing any distinction based on whether the defendant PRP was a private party or the federal government. See Pet. App. 19a; *E.I. du Pont de Nemours & Co.* v. *United States*, 460 F.3d 515, 528-529 (3d Cir. 2006); *Consolidated Edison Co. of New York, Inc.* v. *UGI Utilities, Inc.*, 423 F.3d 90, 100 (2d Cir. 2005). There is no basis for the suggestion (05-1323 Pet. Supp. Br. 2-3) that the government's liability as a PRP under Section 107(a) could somehow be broader than that of private PRPs. To the contrary, CERCLA makes clear that the government's waiver of sovereign immunity is limited to circumstances in which private parties would also be liable under Section 107(a). See 42 U.S.C. 9620(a)(1) (providing that "[e]ach department, agency, and instrumentality of the United States * * * shall be subject to * * * this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under [Section 107]").

Additionally, *UGI* does not present the subsidiary question of whether one PRP could bring an action against another on the theory that Section 107(a) contains an implied right to contribution.[2] The petition in that case should therefore be held pending the Court's disposition of this case, even if the Court decides to grant review only in this case or in *DuPont*.

CONCLUSION

The petition for a writ of certiorari should be granted. In the event that the Court also grants the petition in *E.I. du Pont de Nemours & Co.* v. *United States*, No. 06-726, the cases should be consolidated for oral argument.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JANUARY 2007

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[2] In *UGI*, the court of appeals considered only the question whether the specific language of Section 107(a)(1)-(4)(B) authorizes one PRP to sue another (regardless of whether that cause of action would be characterized as "express" or "implied"). See 423 F.3d at 99. The court did *not* consider whether Section 107 *more generally* contains an implied right to contribution, in the sense that the court of appeals in this case contemplated. See Pet. App. 15a-17a. Nor did the respondent in *UGI* advance any such argument in the court of appeals. See 05-1323 U.S. Br. 13.

FILED
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SUPREME COURT, U.S.

(23)

No. 06-562

In the
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,
Respondent.

On Petition For A Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE AVIALL SERVICES, INC. IN SUPPORT OF PETITIONER UNITED STATES OF AMERICA

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STATEMENT OF INTEREST

Amicus curiae Aviall Services, Inc., is a party in a case on appeal before the United States Court of Appeals for the Fifth Circuit. *Aviall Servs., Inc. v. Cooper Indus., Inc.*, No. 06-10996 (5th Cir. docketed Sept. 18, 2006). One of the issues that Aviall intends to raise in that appeal is the very issue presented by petitioner United States of America in the present case before this Court. The United States and respondent Atlantic Research Corporation have consented to Aviall's submission of this amicus brief, and those parties' written consent is submitted herewith.[1]

SUMMARY OF THE ARGUMENT

Because the question presented in the Petition for Writ of Certiorari is a principal question to be decided by the Fifth Circuit in Aviall's case pending in that court, *Aviall Servs., Inc. v. Cooper Indus., Inc.*, No. 06-10996 (5th Cir. docketed Sept. 18, 2006), Aviall supports the request of the United States that this court grant the petition for writ of certiorari.

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[1] Counsel for Aviall authored this brief in whole. No person or entity other than Aviall made a monetary contribution to preparation or submission of this brief.

ARGUMENT

Aviall brought suit against Cooper Industries in the United States District Court for the Northern District of Texas, seeking to recover Aviall's costs for a voluntary clean-up of pollution on property Aviall had purchased from Cooper. Aviall alleged that pollution occurred on the property at the time Cooper owned it. Aviall sought to recover from Cooper that company's proportionate share of Aviall's clean-up costs under sections 107(a) and 113(f) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").

The district court dismissed Aviall's claims for failure to state a claim. The U.S. Court of Appeals for the Fifth Circuit reversed that decision, but this Court reversed the Fifth Circuit and ruled that a section 113(f) did not authorized Aviall's claim because the claim was not a claim for contribution brought during or following a "civil action." *Cooper v. Aviall*, 125 S. Ct. 577 (2004). The case was remanded to the district court for a determination of whether Aviall could state a claim for under section 107(a) of CERCLA.

On remand, the Fifth Circuit ordered that Aviall be permitted to amend its pleadings in the district court to assert all available statutory claims. Thereafter, Aviall amended its complaint to assert, *inter alia*, claims for direct cost recovery and implied contribution under section 107 and federal common law. The district court granted summary judgment in favor of Cooper, holding that Aviall, as a potentially responsible party ("PRP"), was not entitled to bring a

cost-recovery or contribution action under section 107 against Cooper, also a PRP. The district court then declined to exercise supplemental jurisdiction over Aviall's remaining claims under Texas state law and dismissed the action for lack of subject matter jurisdiction. On September 13, 2006, Aviall filed a timely Notice of Appeal to the U.S. Court of Appeals for the Fifth Circuit, where the appeal is pending.

In the district court, Aviall argued that it was entitled to bring a claim against Cooper under section 107 because: (1) this Court has recognized the existence of an independent right of cost recovery under section 107; (2) the language of section 107(a)(4)(B) authorizes such a cause of action; and (3) Congress did not preempt the cause of action provided in the plain language of section 107. *See* Brief in Support of Aviall's Response to Cooper's Motion for Summary Judgment at 7-14, *Aviall Servs., Inc. v. Cooper Indus., Inc.*, No. 3:97-CV-1926 (N.D. Tex. Aug. 8, 2006), *appeal filed* Sept. 13, 2006 (5th Cir. docketed Sept. 18, 2006).

The thrust of Aviall's argument was, first, that this Court, in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), recognized the existence of an express or implied cause of action under section 107 for cost recovery or contribution that allowed PRPs to seek cost recovery—even after Congress adopted the express right of contribution in section 113.

Second, Aviall argued that when the language of section 107(a)(4)(B) provides that a PRP has liability for response costs incurred by "any other person," the obvious construction of that phrase is that these other

persons are distinguished from the federal, state, and tribal authorities (each of whom are otherwise defined as a "person" under sections 102 and 107 of CERCLA) who have a cause of action under section 107(a)(4)(A). There is nothing in this plain language to indicate that "any other person" is limited to innocent parties or excludes PRPs.

Third, Aviall argued that in adopting section 113, Congress did not preempt or otherwise eliminate the cause of action under section 107 recognized by this Court and various lower courts. In fact, the express language of the last sentence of section 113(f)(1) states: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action . . ." As this Court stated in *Cooper Industries*, the "sole function of the sentence is to clarify that § 113(f)(1) does nothing to 'diminish' any cause(s) of action for contribution that may exist independently of § 113(f)(1)." 125 S. Ct. at 583. According to Aviall, this cause of action for contribution was necessarily implied by section 107 or, alternatively, from federal common law.

In the petition for writ of certiorari in this case, the United States points out that since this Court issued its decision in *Cooper Industries*, three courts of appeals have addressed this question, and at least two other courts of appeals are presently considering it. Petition at 24 n.11. The United States also points out that many district courts have addressed the question—including the district court in Aviall's case—with conflicting results. Petition at 24 n.12.

Aviall's appeal thus brings this question before the Fifth Circuit, which means that this question now is being considered by three courts of appeals. Aviall's appeal thereby confirms the continuing importance of the question presented in the petition for writ of certiorari in the present case.

CONCLUSION

To resolve present conflicts in the lower courts regarding this important question, Aviall Services, Inc., supports the position of the United States asking this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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No. 06-562

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR *AMICI CURIAE* SUPERFUND SETTLEMENTS PROJECT, AMERICAN CHEMISTRY COUNCIL, AMERICAN PETROLEUM INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL, EDISON ELECTRIC INSTITUTE, ENVIRONMENTAL TECHNOLOGY COUNCIL, SOUTH CAROLINA ELECTRIC & GAS, AND UTILITY SOLID WASTE ACTIVITIES GROUP IN SUPPORT OF RESPONDENT

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The Superfund Settlements Project, American Chemistry Council, American Petroleum Institute, Chamber of Commerce of the United States of America, Corporate Environmental Enforcement Council, Edison Electric Institute, Environmental Technology Council, South Carolina Electric & Gas, and Utility Solid Waste Activities Group submit this *amici curiae* brief in support of Respondent Atlantic Research Corporation.[1]

INTEREST OF THE *AMICI CURIAE*

Amici curiae represent diverse sectors of American industry that all share a vital interest in the effective implementation of environmental cleanup programs, including the Superfund program. For more than 25 years, the member companies of *amici curiae* have been actively involved in performing cleanups at hundreds of contaminated sites throughout the United States, with the cumulative cost of those cleanups well in excess of $10 billion. Because other parties are responsible for a substantial share of the contamination at many of these sites, the right to collect from those other parties their equitable shares of the cleanup costs is critical to the member companies of *amici curiae* performing such cleanups. This right is referred to throughout this brief as "the right of contribution,"[2] a term that encom-

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[1] In accordance with Rule 37.6, this brief is not authored in whole or in part by counsel for any party. No person or entity other than *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and their letters of consent are on file with the Clerk of this Court.

[2] As a practical matter, every section 107 cost recovery claim by one PRP against another PRP is a claim for contribution. Although a section 107 plaintiff typically proceeds on a theory of joint and several liability, the defendant always may counterclaim under section 113 for equitable contribution from the plaintiff. The net result is that the court determines the equitable shares of both the plaintiff and the defendant, whether or not the section 107 plaintiff specifically pleads a claim for contribution. As the Government acknowledges, cost recovery actions include claims for

passes claims under either section 107 or section 113 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9607(a)(1-4)(B), 9613(f)(1). *See Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994).

In the past, the member companies of *amici curiae* typically have pursued the right of contribution by filing claims under section 113 of CERCLA. But in the wake of this Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), which held that a potentially responsible party ("PRP") may not seek contribution under section 113(f)(1) until it has been sued under CERCLA, section 107 is now the only mechanism available in many cases to compel other liable parties to pay an equitable share of the cleanup costs. If section 107 were to become unavailable, member companies of *amici curiae* would be forced to bear the full burden of those cleanups that already are underway while other parties would escape liability for contaminating those sites, a result contrary to basic notions of equity and fairness. Moreover, without the right of contribution, future cleanups at many thousands of sites would be discouraged and delayed. Thus, disposition of the issue raised in this case will have a direct effect on each of the *amici curiae* and on their member companies.

The Superfund Settlements Project ("SSP") is a non-profit association of major corporations with substantial experience in the Superfund program. The SSP is dedicated to improving the implementation of CERCLA by reducing barriers to settlement, minimizing transaction costs, and using existing legal authorities to make the program faster, fairer, and more efficient. To date, SSP's member companies alone have spent more than $6 billion on site cleanups.

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contribution. *See* Brief for United States at 33 n.14, *United States v. Atlantic Research*, No. 06-562 (filed Mar. 1, 2007) ("Contribution is merely a form of cost recovery, not a wholly independent type of relief.").

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The ACC is committed to improving environmental, health, and safety performance through its Responsible Care© industry initiative, common sense advocacy designed to address major public policy issues, health and environmental research, and product testing. To date, ACC member companies also have spent billions of dollars on Superfund cleanups.

The American Petroleum Institute ("API") is a nationwide, not-for-profit trade association representing about 400 member companies engaged in all aspects of the oil and natural gas industry, including exploration, production, transportation, refining, distribution, and marketing. API frequently represents its members on important legal and policy matters before the courts, agencies, and legislative bodies. API's members are or have been directly involved in the remediation—including voluntary remediations—of numerous sites under CERCLA, often at great economic cost.

The Chamber of Commerce of the United States of America ("Chamber"), founded in 1912, is the world's largest not-for-profit business federation, representing a membership of over three million businesses and business organizations of every size, in every business sector, and from every geographic area. Ninety-six percent of the Chamber's members are businesses with less than one hundred employees. As the nation's preeminent business association, the Chamber has an abiding interest in the scope of federal regulatory authority in general, and in environmental regulation in particular. The Chamber regularly advocates its members' views in court on environmental issues of national concern to the business community.

The Corporate Environmental Enforcement Council ("CEEC") is an organization of corporate counsel and environmental management representing thirty major companies from a wide range of industrial sectors, including metals, chemicals, pharmaceuticals, paper, mining, oil refining, and

natural resource exploration. CEEC focuses on civil and criminal environmental enforcement and enforcement policy issues by providing a forum for review and discussion of such issues and developing constructive recommendations to executive and legislative environmental enforcement policy makers. CEEC member companies are involved in investigation, removal, and remediation activities at hundreds of Superfund sites across the United States.

The Environmental Technology Council ("ETC") is the national trade association for the commercial hazardous waste management industry. ETC firms provide technologies and services to customers for the recycling, treatment, and secure disposal of industrial and hazardous wastes, including the cleanup of contaminated industrial sites. Many ETC members also are involved in corrective action cleanups at their own properties.

South Carolina Electric & Gas ("SCE&G") is a South Carolina corporation and a wholly owned subsidiary of SCANA Corporation. SCE&G currently is working with EPA and the South Carolina Department of Health and Environmental Control to voluntarily investigate, remediate, and monitor a contaminated site. SCE&G has brought claims for response costs and contribution under CERCLA against the former owner and operator of the site.

The Utility Solid Waste Activities Group ("USWAG") was formed in 1978, and is an association primarily dedicated to assisting its members in the management of wastes, the beneficial use of materials associated with the generation, transmission, or sale of electricity and natural gas, and the remediation of contaminated sites in an environmentally-protective and cost-effective manner. Its membership is comprised of approximately 80 energy industry operating companies as well as several energy industry associations, including *amicus* Edison Electric Institute ("EEI"). EEI is the national association of investor-owned electric utility com-

panies and acts as spokesman for those firms on subjects of national interest. Together, USWAG members represent more than 85% of the total electric generating capacity of the United States and service more than 95% of the nation's consumers of electricity and over 93% of the nation's consumers of natural gas.

The member companies of *amici curiae* have incurred, and continue to incur, enormous cleanup costs for which CERCLA offers the only practical means of seeking contribution from other responsible parties. If this Court were to reverse the judgment of the Eighth Circuit and bar PRPs from bringing actions under section 107, then many of *amici curiae*'s member companies would find themselves in an untenable position. Because they initiated cleanup efforts without forcing the Government to initiate CERCLA litigation, *Cooper Industries* bars them from seeking contribution under section 113. Thus, the Government's position here would effectively slam the door on their only means of obtaining equitable contribution from other responsible parties that have resisted sharing in the cleanup costs.

Moreover, denying the right of contribution under section 107 would create an immediate and overwhelming disincentive for companies to perform future cleanups. Absent a secure right of contribution, companies understandably would be reluctant to initiate or complete cleanups. As a result, vitally important cleanups would be discouraged or delayed.

SUMMARY OF ARGUMENT

The Government's interpretation of section 107(a)(4)(B) contradicts EPA's duly-promulgated regulations and long-standing policy. Given the many thousands of contaminated sites around the country and the enormous cost of cleaning them up, EPA has long recognized that cleanups can be achieved only with the cooperation, resources, and expertise of the private sector. EPA also has recognized that the ability of a PRP to recover from other responsible parties any

response costs that exceed its equitable share provides a crucial incentive to perform these cleanups. For this reason, EPA's 1990 revised National Contingency Plan ("NCP") regulations recognized that PRPs may use section 107 to seek contribution from other PRPs, and indeed provided practical guidance on how such claims should be perfected. The Government's reading of section 107 directly contradicts this duly-promulgated regulation.

Curtailing the use of section 107 by PRPs would severely undermine the incentives for companies to undertake cleanups. Indeed, because CERCLA's contribution scheme functions as the recovery vehicle in a broad range of contexts far beyond those sites listed on EPA's National Priorities List ("NPL"), denying PRPs the right to seek contribution under section 107 would create powerful disincentives to cleanup at many thousands of contaminated sites beyond formally designated Superfund sites.

First, curtailing the right of contribution under section 107 would discourage and delay cleanup of the thousands of sites contaminated by departments and agencies of the United States, the majority of which are not formally designated as Superfund sites. Second, the Government's position here would needlessly postpone cleanup of the many thousands of brownfields sites found throughout our inner cities and working-class communities. Third, precluding PRPs from seeking contribution under section 107 would inevitably delay the cleanup of the thousands of Resource Conservation and Recovery Act ("RCRA") "corrective action" sites contaminated by decades of industrial activity. Finally, cleanup of Superfund sites where EPA decides to issue unilateral administrative orders under section 106 of CERCLA to compel the performance of cleanup work would be discouraged. Given the environmental and health risks posed by many of these sites, in addition to the social and economic costs associated with delaying their cleanup, it is imperative that this Court affirm the judgment of the Eighth Circuit.

ARGUMENT

I. THE GOVERNMENT'S READING OF SECTION 107 CONTRADICTS EPA'S DULY-PROMULGATED REGULATIONS AND LONG-STANDING POLICY.

The prime objective of CERCLA is to enable the swift, efficacious, and equitable cleanup of hazardous waste sites. The right of contribution is critical to achieving this goal. If PRPs are foreclosed from pursuing contribution claims under section 107, they will be reluctant to initiate or complete cleanups until they have been sued under CERCLA, thereby triggering their right to seek contribution under section 113. Waiting to be sued under CERCLA, however, can take years, and at many sites, no suit will ever be filed. Curtailing the right of PRPs to seek contribution under section 107 thus inevitably would discourage and delay the cleanup of thousands of contaminated sites, frustrating CERCLA's fundamental purpose.[3]

In 1980, Congress enacted CERCLA, 42 U.S.C. § 9601 *et seq.*, in response to the then new and frightening problem of abandoned toxic waste sites.[4] *See United States v. Bestfoods*, 524 U.S. 51, 55 (1998). The purpose of CERCLA was to "ensure the prompt and effective cleanup of waste disposal sites, and to assure that parties responsible for hazardous substances bore the cost of remedying the conditions they

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[3] Indeed, the Government has acknowledged this very point, arguing to this Court in *Pinal Creek v. Newmont Mining Co.*, 118 F.3d 1298, (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998), that "[t]he right to contribution provides a strong additional incentive [for a PRP] to engage in a *voluntary* cleanup." Brief for the United States as *Amicus Curiae*, 1998 WL 34103033, at *15 (No. 97-795) (emphasis added). In its brief in this case, however, the Government fails to explain its substantial change in position. *See* Brief for United States at 43.

[4] *See generally* John Quarles & Michael W. Steinberg, *The Superfund Program at Its 25th Anniversary*, 36 Envtl. L. Rep. (Envtl. L. Inst.) 10364 (2006).

created." *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1455 (9th Cir. 1986). As this Court has recognized, given the scope of the problem, "[t]he remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the cost of cleanup." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21 (1989) (plurality opinion of Brennan, J.) (emphasis in original), *overruled on other grounds*, *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

To help achieve this ambitious goal, CERCLA combined the individually harsh elements of retroactive liability, strict liability, and joint and several liability into an unprecedented legal framework.[5] Because such a scheme bears an inherent risk of inflicting disproportionate and inequitable liability, the right of contribution provides a crucial safety valve that both mitigates the risk of unfairness and provides incentives for private parties to clean up contaminated sites. Indeed, within CERCLA's web of potentially disproportionate and unjust liability, only the right to seek equitable contribution from other responsible parties holds out a promise of fairness and thus provides an incentive for private parties to move forward swiftly to clean up sites. *See, e.g.*, *Key Tronic*, 511 U.S. at 819 n.13 (one of CERCLA's main goals was to "'encourage private parties to assume the financial responsibility of clean-up by allowing them to seek recovery from others'") (quoting *FMC Corp. v. Aero Industries, Inc.*, 998 F.2d 842, 847 (10th Cir. 1993)).

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[5] Although CERCLA does not expressly state the standard of liability, the courts generally have construed CERCLA section 107 liability to be retroactive, strict, and joint and several. *See, e.g., In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 901-02 (5th Cir. 1993); *United States v. Monsanto* Co., 858 F.2d 160, 168 (4th Cir. 1988) *cert. denied*, 490 U.S. 1106 (1989); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985).

From the inception of the Superfund program, EPA viewed this right of contribution as critical to encouraging private parties to perform cleanups. Since as early as 1984, EPA has implemented CERCLA based on the fundamental policy that "[i]t is . . . preferable for private parties to conduct cleanups themselves." Lee M. Thomas and F. Henry Habicht II, U.S. EPA, *Interim CERCLA Settlement Policy* (OSWER Directive No. 9835.0) (Dec. 5, 1984), *published at* 50 Fed. Reg. 5034, 5035 (Feb. 5, 1985) ("recogniz[ing]" that "administrative action and litigation will not be sufficient to accomplish CERCLA's goals, and that voluntary cleanups are essential to a successful program for cleanup of the nation's hazardous waste sites"). EPA's approach to implementing CERCLA is highly pragmatic, as federal and state agencies simply do not have the resources to address all of the contaminated sites, nor are they always able to address those sites quickly or efficiently. Accordingly, EPA committed itself more than 20 years ago to "remov[ing] or minimiz[ing] if possible the impediments to voluntary cleanup." *Id.*

With the passage of the Superfund Amendments and Reauthorization Act ("SARA") in 1986, Congress ratified—and expanded upon—EPA's approach. With the addition of section 113(f), Congress expressly recognized the right of equitable contribution and sought to encourage private parties to perform cleanups by allowing them to recoup their costs from other liable parties:

> Congress did not think it enough . . . to permit only the Federal Government to recoup the costs of its own cleanups of hazardous-waste sites; the Government's resources being finite, it could neither pay up front for all necessary cleanups nor undertake many different projects at the same time. Some help was needed, and Congress sought to encourage that help by allowing private parties who *voluntarily* cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from the other potentially responsible parties.

Union Gas, 491 U.S. at 21-22 (plurality opinion of Brennan, J.) (citations omitted, emphasis added).

Following the passage of SARA, EPA pledged to support in court the equitable claims of those who performed cleanups against those who declined to participate. To this end, in 1990, EPA amended the National Contingency Plan regulations, adding a new subpart H for the express purpose of clarifying how private parties should go about performing cleanups in order to recover their costs from other parties through contribution litigation. *See* 40 C.F.R. pt. 300, subpt. H. (2006).

EPA explained its new subpart H rules with reference to these core policies:

> EPA believes that it is important to encourage private parties to perform *voluntary* cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination.

National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666, 8792-93 (Mar. 8, 1990) (codified at 40 C.F.R. pt. 300, subpt. H (2006)) (emphasis added). EPA also took pains to state that PRPs that clean up sites may seek to recover their costs *before* completing their cleanups because "requiring a party to incur all costs before bringing a cost recovery action may discourage and delay cleanups, contrary to the intent of Congress that sites be cleaned up expeditiously." *Id.* at 8798.

Most importantly, in promulgating subpart H, EPA clearly announced that section 107(a)(4)(B) is broad enough to include claims brought by PRPs against other PRPs. *See id.* at 8792 (section 107(a)(4)(B)'s "other persons" includes "persons who are not the federal government, a state, or an Indian tribe"). Indeed, EPA evidently assumed that most of the parties who would utilize new subpart H were PRPs that were performing cleanups and sought to recover cleanup costs

from other responsible parties.

Thus, the Government's position in this case not only undermines EPA's 20-year old policy that it is "preferable for private parties to conduct cleanups themselves,"[6] but also contradicts subpart H of the revised NCP, a duly-promulgated regulation that has the force of law. *See United States v. Nixon*, 418 U.S. 683, 686 (1974) ("So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it.").

It is surprising that the Government never attempts to reconcile its position here with EPA's regulation. Nor does the Government even acknowledge that EPA's interpretation of the scope of section 107(a)(4)(B) is entitled to substantial judicial deference. *See, e.g., National Cable & Telecommunications Ass'n v. Brand X Internet Svcs.*, 545 U.S. 967, 981-82 (2005) ("*Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps."); *Udall v. Tallman*, 380 U.S. 1, 16, (1965) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."). It is one thing for the Government to change its litigation position over time, but it is quite another to ignore an agency's valid and controlling regulation.

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[6] Recognizing the conflict, one EPA attorney has speculated that the Department of Justice decided to "advocat[e] a position potentially detrimental to EPA's policy interest" because "its motivation was primarily the protection of federal PRPs facing contribution claims[.] It seems apparent that DOJ, charged under the Unitary Executive principle with balancing the competing policy interests of its client agencies, had determined to resolve the conflict in favor of federal agency defense rather than EPA enforcement, with results which may, on balance, prove favorable to the federal purse but not necessarily to environmental protection." William C. Tucker, *The Manacled Octopus: The Unitary Executive and EPA Enforcement Involving Federal Agencies*, 16 Vill. Envtl. L.J. 149, 161-62 (2005).

This conflict is all the more significant given that EPA's reliance on the right of contribution as a powerful incentive to encourage private parties to cleanup contaminated sites has proven to be highly successful, resulting in cleanup settlements at NPL sites with a cumulative value in excess of $20 billion. Indeed, today it is common for companies that have not been sued under CERCLA to agree to perform the entire cleanup at an NPL site, even though their fair share of the responsibility may be relatively modest.[7] Over 70% of the new Superfund NPL cleanups each year are launched through agreements such as these.[8] These agreements are possible only because of the availability of equitable contribution from those who do not consent to participate.[9] Moreover, companies that refuse to participate know that they can be held liable for their equitable shares. But for this right of contribution, companies understandably would resist undertaking new cleanup obligations, and rarely would do so voluntarily.

II. THE GOVERNMENT'S READING OF SECTION 107 WOULD DISCOURAGE AND DELAY CLEANUPS AT MANY THOUSANDS OF CONTAMINATED SITES.

The Government's interpretation of section 107 not only contradicts EPA's duly-promulgated regulation and long-

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[7] A recent study by the Environmental Law Institute reported that cleanups also were underway at over 15,000 sites that were not on the National Priorities List under the auspices of state cleanup programs. *See* John Pendergrass, *An Analysis of State Superfund Programs: 50-State Study, 2001 Update* (ELI) 16-17 (2002).

[8] U.S. EPA, *Superfund Accomplishment Figures, Summary Fiscal Year (FY) 2003*, http://www.epa.gov/superfund/action/process/numbers.htm (last visited December 18, 2006).

[9] *See, e.g., Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (implicitly allowing contribution action to proceed without state or federal precursor action of any kind); *Westfarm Assoc. Lim. Part. v. Washington Suburban Sanitary Comm.*, 66 F.3d 669, 677 (4th Cir. 1995) (same).

standing policy, it also would eliminate vital incentives that make prompt and efficient cleanups possible. Indeed, curtailing the right of contribution under section 107 would "create a perverse incentive for PRPs to wait until they are sued before incurring response costs," ultimately discouraging and delaying cleanups across a broad spectrum of contaminated sites. *Syms v. Olin Corp.*, 408 F.3d 95, 106 n.8 (2d Cir. 2005) (observing that after *Cooper Industries*, if PRPs are unable to bring an action under section 107, they are left "with no mechanism for recovering response costs until proceedings are brought against the PRP" and thus, "if a PRP remediates a facility on its own initiative, it reduces the likelihood that it will be sued under § 106 or § 107(a), and thereby jeopardizes its opportunity to seek contribution under § 113(f) from other PRPs"). Because CERCLA's contribution scheme functions as the recovery vehicle in a broad range of contexts beyond the relatively small number of sites listed on the National Priorities List, as explained below, curtailing the statutory right to seek contribution under section 107 would create such perverse incentives at many thousands of sites being addressed outside of the Superfund context.

A. Contribution Claims Provide a Vital Incentive for Private Parties to Initiate and Complete Cleanups.

The Government's interpretation of section 107 would preclude a PRP that initiates or agrees to undertake a cleanup without being sued by the Federal Government from recouping expenditures that exceed its share of the responsibility. Such an inequitable outcome inevitably would create a powerful incentive for a private company to refrain from initiating a voluntary remediation. Indeed, if the only vehicle for seeking contribution from other liable parties is section 113(f), the economically rational response would be for companies to resist undertaking any new cleanup obligations until a governmental agency sues them under CERCLA.

Ultimately, EPA and its state agency counterparts would be required to rely primarily on litigation to achieve progress at contaminated sites. Federal and state agencies, however, lack the resources necessary to initiate litigation for every site, and thus far fewer cleanups would take place. Even where litigation is pursued, far greater judicial and administrative resources would be consumed, and higher transaction costs would be inflicted on all concerned, ultimately diverting precious funds from the limited pool of resources dedicated to the enforcement of environmental laws. Inevitably, the pace of cleanups would be slowed. It was for precisely this reason that EPA committed itself nearly 20 years ago "to encourag[ing] private parties to perform voluntary cleanups of sites, and to remov[ing] unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination." 55 Fed. Reg. at 8792-93.

The Government offers the unrealistic suggestion that cleanups would not be discouraged or delayed because companies can simply enter into settlements with EPA and *then* seek contribution from other parties.[10] *See* Brief for the

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[10] It also has been suggested that cleanups might not be discouraged because some companies might be able to seek contribution under state law. *See, e.g., Aviall Servs., Inc. v. Cooper Indus., Inc.*, 263 F.3d 134, 145 (5th Cir. 2001), *rev'd*, 312 F.3d 677 (5th Cir. 2002) (*en banc*), *rev'd*, 543 U.S. 157 (2004). This suggestion is unrealistic for several reasons. First, CERCLA may preempt state-law contribution claims in situations where no recovery would be available under CERCLA itself. *See, e.g., In re Reading*, 115 F.3d 1111, 1117 (3d Cir. 1997) (state common law claims for contribution and restitution preempted by CERCLA's statutory right of contribution). Second, many suits seeking contribution from the United States under state law would be barred by sovereign immunity because CERCLA waives that immunity for state-law claims only at facilities "owned or operated by" federal agencies, 42 U.S.C. § 9620(a)(4), leaving parties cleaning up privately-owned sites that are heavily contaminated with wastes contributed by the United States—including the sites at issue in this case—with no recourse under state law. Third, vexing choice-of-law questions would bog down many state-law contribution

United States at 43. Not only is this option contrary to the approach EPA has followed for over 20 years, it also is unavailable as a practical matter. In practical terms, what the Government is suggesting is that a private party "enter into settlement" with EPA by seeking out a CERCLA consent decree under section 107. *See* CERCLA § 122(d), 42 U.S.C. § 9622(d). Realistically, however, EPA simply does not have the resources—or the desire—to develop such documents for the thousands upon thousands of contaminated sites that are in need of cleanup. Indeed, as explained below, most of the tens of thousands of contaminated sites across the country are of little or no interest to EPA, whose limited CERCLA resources are fully occupied dealing with the roughly 1,245 contaminated sites that it has listed on the NPL.[11] Thus, a company that asks EPA to make time to negotiate a set of documents for a site that is of little or no federal interest almost certainly would be turned down.[12] And because

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claims. Finally, many state law statutes are modeled on CERCLA and thus would not necessarily provide an independent or supplemental basis for seeking contribution. *See, e.g., Hicks Family v. 1st Nat'l Bank of Howell*, No. 268400, 2006 Mich. App. LEXIS 2933, at *17-23 (Mich. App. Ct. Oct. 3, 2006) (finding that the contribution provisions of Michigan's Natural Resources and Environmental Protection Act were subject to the same requirements imposed by the nearly identical language of CERCLA's contribution provisions). This patchwork of state-law contribution rights cannot plausibly be viewed as a substitute for the right of contribution that Congress conferred in CERCLA.

[11] The NPL is "a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States"—that is, the list of contaminated sites that EPA has determined are a priority for further investigation and remediation. *National Priorities List*; Proposed Rule No. 46; 72 Fed. Reg. 10,105 (Mar. 7, 2007).

[12] Indeed, as Justice Ginsburg aptly noted at oral argument in *Cooper Industries*, "EPA has got a lot of things on its agenda . . . [and thus PRPs] might be sitting around waiting forever till EPA comes after [them]." Transcript of Oral Argument at 6-7, *Cooper Industries*, 543 U.S. 157 (No. 02-1192).

States face similar resource constraints, companies seeking to preserve their right to CERCLA contribution by resolving their CERCLA liability to a State (pursuant to section 113(f)(3)(B)) likely will fail as well. As a result, the Government's interpretation of section 107 would needlessly discourage and delay cleanups throughout the United States.

As the Eighth Circuit properly concluded below, "nothing in CERCLA's words[] suggest[s] Congress intended to establish a comprehensive contribution and cost recovery scheme encouraging private cleanup of contaminated sites, while simultaneously excepting—indeed, penalizing—those who voluntarily assume such duties." *Atlantic Research Corp. v. United States*, 459 F.3d 827, 836 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 1144 (2007). *See also* John M. Hyson, *Contribution Claims Under Section 113(f)(1) of CERCLA*, 32 Envtl. L. Rep. (Envtl. L. Inst.) 10151, 10155 (2002) (questioning "why a Congress, bent on *encouraging* voluntary cleanups, would relegate cost recovery actions by volunteers to state courts") (emphasis in original, footnote omitted).[13]

B. Curtailing the Right of Contribution Would Discourage and Delay Cleanups at Thousands of Sites Not Listed on EPA's National Priorities List.

Because CERCLA's contribution scheme serves as the recovery vehicle for companies cleaning up sites that are not listed on EPA's NPL, the Government's approach to section

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[13] *See, e.g.*, *Mobay Corp. v. Allied Signal, Inc.*, 761 F. Supp. 345, 349 (D.N.J. 1991) (quoting H.R. Rep. No. 1016, at 33 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6136) ("A fundamental policy underlying CERCLA is to accomplish this objective at the primary expense of private responsible parties rather than taxpayers. The House Report explained that the purpose of section 107 of CERCLA is 'to provide a mechanism for prompt recovery of monies expended for the costs of [remedial actions] . . . from persons responsible therefore [sic] and to induce such potentially liable persons to pursue appropriate environmental response actions voluntarily.'").

107 would create the counterproductive and inequitable results described above at many thousands of contaminated sites. Indeed, the Government fails to acknowledge the vital role that CERCLA's contribution scheme plays in encouraging cleanups at a broad range of contaminated sites.

In section 105, Congress directed that CERCLA's remedial scheme, as implemented in the National Contingency Plan, apply whenever a party conducts a cleanup of a contaminated site. 42 U.S.C. § 9605(a) ("Following publication of the revised national contingency plan, the response to and actions to minimize damage from hazardous substances releases shall, to the greatest extent possible, be in accordance with the plan."). Because Congress called on CERCLA to apply "to the greatest extent possible," both EPA and private parties have long relied on, and courts have approved, the use of CERCLA's contribution scheme as the means of providing recovery for parties undertaking cleanups at a broad range of sites beyond those listed on the NPL or otherwise designated as Superfund sites.[14] CERCLA's contribution scheme thus serves as the recovery vehicle for companies cleaning up thousands of sites across the country that are not designated as Superfund sites. As explained below, the Government's reading of section 107 would have devastating consequences across a broad spectrum of sites not addressed in its brief.

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[14] *See, e.g.*, *United States v. Rohm & Haas, Inc.*, 2 F.3d 1265, 1272-75 (3d Cir. 1993) (approving the use of CERCLA's recovery scheme in the context of RCRA sites), *overruled on other grounds*, *United States v. E.I. du Pont de Nemours & Co.*, 432 F.3d 161 (3d Cir. 2005) (*en banc*); *United States v. E.I. du Pont de Nemours & Co.*, 341 F. Supp. 2d 215, 237 (W.D.N.Y. 2004) ("There is nothing in this broadly worded provision to suggest that Congress intended to limit recovery to costs of response actions taken under CERCLA."); *Union Carbide Corp. v. Thiokol Corp.*, 890 F. Supp. 1035, 1044 (S.D. Ga. 1994) ("The overwhelming evidence is that Congress intended CERCLA to be cumulative and not . . . to be limited in its application to formally designated Superfund sites.") (quotations and citation omitted).

To demonstrate the severe negative effects of finding that PRPs are precluded from seeking contribution under section 107, *amici* describe below five important categories of cleanups that would be discouraged and/or delayed if the right of contribution is denied. These are: (1) sites polluted by the Federal Government, (2) brownfields sites, (3) RCRA corrective action sites, (4) Superfund site investigations, and (5) cleanups conducted pursuant to CERCLA section 106 unilateral administrative orders ("UAOs").

1. *Cleanups at Sites Polluted by the Federal Government.*

Perhaps the most dramatic impact of curtailing the right of contribution would be seen at the many thousands of sites that have been contaminated by the departments and agencies of the United States itself. These include not just the thousands of sites actually owned and operated by the United States, but also the many private sites to which the United States contributed waste, including those at issue in this case and those at issue in the pending case of *E.I. du Pont de Nemours & Co. v. United States*, No. 06-726 (petition for certiorari filed on Dec. 27, 2006).

The docket of contaminated sites owned and operated by the Federal Government is staggering.[15] As of 1995, the United States owned and managed half a billion acres of land containing more than 60,000 potentially contaminated sites.[16] Among these sites were former nuclear weapons production facilities, military bases, abandoned mines, landfills, and underground storage tanks. According to the Government itself, the total cleanup cost for these sites was estimated to be at

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[15] *See* H. Comm. on Natural Resources, 103d Cong., *Deep Pockets: Taxpayer Liability for Environmental Contamination* (Comm. Print No. 2 1993).

[16] According to a Government estimate, a total of 60,425 potentially contaminated sites are present on land owned by the Departments of Agriculture, Defense, Energy, and Interior. Federal Facilities Policy Group, *Improving Federal Facilities Cleanup* 17 (Oct. 1995).

least $230 billion in 1995, and might be nearly twice that amount.[17]

Also of enormous significance is the docket of privately-owned sites that have been contaminated in whole or in part from the activities of the Federal Government. These sites include waste oil recycling facilities that primarily served military bases,[18] nuclear fuel processing plants that helped support the Cold War weapons production programs,[19] disposal sites that accepted large volumes of waste from the Government,[20] and industrial sites effectively commandeered by the Federal Government for its war efforts.[21]

EPA and state regulatory agencies seeking to expedite the cleanups at these sites often are unable to sue the federal department or agency that helped to create the problem.[22]

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[17] Government estimates in 1995 ranged from $234 billion to $388 billion in cleanup costs. *Id.*

[18] The Bridgeport Rental and Oil Services Superfund site in Logan Township, New Jersey is a good example. The site included a 13-acre oil lagoon containing high levels of PCBs. Most of the oil originated at the Philadelphia Naval Shipyard.

[19] *See, e.g., Westinghouse Electric Co. v. United States,* No. 4:03CV00861 SNL (E.D. Mo., filed June 26, 2003) (CERCLA complaint seeking contribution for cleanup of radioactive and hazardous contamination at former Hematite nuclear fuel processing plant in Festus, Missouri).

[20] For example, the Stringfellow Acid Pits site near Los Angeles, California counted nearby military installations among its major customers.

[21] *See, e.g., General Motors Corp. v. United States,* No. Civ.A. 01-CV-2201, 2005 WL 548266 (D.N.J. Mar. 2, 2005) (permitting plaintiff to amend complaint to include section 107 contribution claim for 15 industrial sites in various states that the United States allegedly owned or operated during and after World War II, the Korean War, and the Vietnam War in order to satisfy its military needs or which the United States effectively commandeered for its war efforts); *Viacom, Inc, v. United States,* 404 F. Supp. 2d 3 (D.D.C. 2005) (CERCLA contribution action arising out of radiological contamination caused by uranium production by Westinghouse for the Manhattan project).

[22] Contrary to the Government's suggestion, *see* Brief for United States at 44, EPA often is prevented from suing other federal agencies under

Instead, they approach private companies that also share the liability at these sites, hoping the companies will agree to undertake the cleanups themselves. Companies, however, cannot reasonably be expected to perform these massive and costly cleanups absent some mechanism for swiftly obtaining equitable contribution from the United States.

Prior to this Court's decision in *Cooper Industries*, private companies often sought contribution from the United States under section 113. In the wake of *Cooper Industries*, however, they are unable to do so because no prior civil action has been filed under section 106 or 107. As a result, if this Court holds that section 107 also is unavailable to a PRP seeking contribution, private companies would have little incentive to perform these cleanups and EPA and its state agency counterparts would be presented with a Hobson's choice. Because EPA and the states typically cannot sue the responsible federal agencies to compel them to clean up these sites, either these agencies will have to expend scarce resources suing private companies to compel cleanups, thereby burdening the courts with needless claims, or else the cleanup of these sites would be unacceptably delayed. Neither result can be squared with the central purpose of CERCLA.

Yet another disturbing aspect of this scenario is that the Government could, as the Eighth Circuit recognized, "insu-

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CERCLA because the Department of Justice views such cases as conflicts within the Executive Branch that present no justiciable case or controversy under Article III of the Constitution. *See* Tucker, 16 Vill. Envtl. L.J. at 150 ("Although CERCLA clearly designates federal and state agencies as potentially liable 'persons,' the Executive Branch has consistently taken the position that EPA cannot independently enforce CERCLA in the federal courts against federal agency PRPs (federal PRPs), because to do so would violate the Constitution."). States seeking to compel cleanup often are prevented from suing the same federal agencies under state law due to the doctrine of sovereign immunity because CERCLA waives that immunity only at facilities "owned or operated by" federal agencies. 42 U.S.C. § 9620(a)(4). *See FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 839-40 (3d Cir. 1994) (*en banc*).

late itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle." *Atl. Research*, 459 F.3d at 837. Permitting the Government to immunize itself from liability in this fashion "results in an absurd and unjust outcome." *Id.* Indeed, it does nothing less than "eviscerate CERCLA whenever the Government, itself, was partially responsible for a site's contamination."[23] *Id.*

Given the staggering number of contaminated sites owned and operated by the Federal Government and the many private sites at which the Government is responsible for at least some of the contamination, it is vitally important that this Court affirm the judgment of the Eighth Circuit holding that section 107 provides a mechanism for PRPs to recover the Government's equitable share of the cost of cleanup.

2. *Cleanups at Brownfields Sites.*

Curtailing the use of section 107 also would retard cleanup efforts at another important category of sites not addressed in the Government's brief: the many thousands of so-called "brownfields" sites around the country. America today is blighted by hundreds of thousands of sites that are smaller and less contaminated than the Superfund sites listed on EPA's NPL. Indeed, over the next 30 years, between 235,000-355,000 contaminated sites will require some level

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[23] The Government contends that such a result is "highly improbable." Brief for United States at 44. To the contrary, this result is precisely what occurred in this case as well as in the pending case of *E.I. du Pont de Nemours v. United States*, No. 06-726 (petition for certiorari filed Dec. 27, 2006). Indeed, EPA consistently has adhered to a practice of refusing to pursue enforcement actions against another constituent element of the Executive Branch. *See* Tucker, 16 Vill. Envtl. L.J. at 150. None of the cases cited by the Government supports its contention that EPA has been able to compel other federal agencies to assume responsibility for cleaning up contaminated sites.

of remediation.[24] Even though more than 90 percent of those sites involve smaller, less complex cleanup projects than those being addressed through the NPL, EPA still projects that cleaning up these sites will cost $170-250 billion.[25] EPA further estimates that "only 10-15 percent of the estimated one-half to one million brownfield sites have been identified," and that "most of the remaining sites have not been identified, primarily because they are vacant or underused and the owners do not wish to become involved in the complicated and costly world of remediation."[26] Despite the devastating impact these sites have on this nation's cities and working-class neighborhoods, federal and state regulators simply will never get around to ordering or performing clean-ups of these sites.

Recognizing that voluntary action by private parties is essential to cleaning up these sites, the federal and state governments have established a host of programs over the past few decades to encourage private industry to undertake brownfields cleanups on a voluntary basis. The most recent of these programs is the Brownfields Revitalization and Environmental Restoration Act of 2001, which provides new incentives to spur brownfields redevelopment. *See* Pub. L. No. 107-118, Tit. II, 115 Stat. 2356 (2002). Other preexisting brownfields programs include enterprise zones and empowerment zones, which feature tax benefits for companies that locate in these distressed areas. The overwhelming governmental response to the challenge of brownfields thus has been to encourage voluntary cleanups and redevelopment.

CERCLA's right of contribution plays a vital role in this effort as it encourages companies to clean up these sites by permitting them to seek contribution from other responsible

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[24] *See* U.S. EPA, *Cleaning Up the Nation's Waste Sites: Markets and Technology Trends 2004 Edition*, EPA 542-R-04-015 (Sept. 2004), at 1-5.

[25] *Id.* at 1-6.

[26] *Id.* at 1-23.

parties and postponing disputes over response costs that otherwise would delay such cleanups. Curtailing the right of contribution thus would eliminate critical incentives for private parties to restore these sites. Such a result would directly undermine Congress's attempt to encourage private parties to voluntarily restore brownfields properties to economic productivity.

3. *Cleanups at RCRA Corrective Action Sites.*

The Government's reading of section 107 also would delay the cleanup of the thousands of contaminated sites being addressed through the corrective action program under Subtitle C of RCRA. The RCRA Subtitle C program includes more than 6,500 industrial facilities that handle or formerly handled hazardous wastes and often are heavily contaminated after decades of industrial operations.[27]

In 1984, Congress mandated that contaminated RCRA facilities undergo "corrective action."[28] Corrective action—another term for cleanup of past contamination—is implemented either through RCRA permits or through RCRA administrative orders on consent which are issued to the site owners by state environmental regulatory agencies.[29] After a RCRA permit or order is issued, site owners may seek to challenge the cleanup plans selected by the agencies, or

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[27] *See* U.S. EPA, *Corrective Action: Basic Information*, http://www.epa.gov/epaoswer/hazwaste/ca/backgnd.htm#4 (last updated Feb. 22, 2006).

[28] Section 3004(u) of RCRA provides that permits issued after enactment of the 1984 Amendments "shall require corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit." 42 U.S.C. § 6924(u).

[29] *See* U.S. EPA, *Corrective Action: Basic Information*, http://www.epa.gov/epaoswer/hazwaste/ca/backgnd.htm#6 (last updated Feb. 22, 2006).

instead may choose to perform the work without objection. As a practical matter then, because RCRA corrective action cleanups typically take a decade or longer to complete, the efficient cleanup of these sites depends critically upon the cooperative efforts of site owners.

The right to contribution also is particularly important under RCRA, because RCRA generally imposes cleanup obligations only on the *current* owners of facilities. However, because many RCRA facilities typically have been operated successively by two or more companies over many decades, it is common that a *previous* owner contributed some or even most of the contamination. As a result, site owners performing corrective action under RCRA often seek contribution from other parties. Although RCRA itself contains no express provision for contribution, courts have approved the use of CERCLA to recover costs incurred in cleaning up RCRA corrective action sites. *See, e.g., Rohm & Haas, Inc.*, 2 F.3d at 1272-75; *Union Carbide*, 890 F. Supp. at 1044.

Prior to this Court's decision in *Cooper Industries*, site owners often used section 113 of CERCLA as a vehicle for obtaining contribution. In the wake of *Cooper Industries*, however, they are unable to do so because these cleanups are performed under RCRA permits or orders on consent and thus no prior "civil action" under sections 106 or 107 exists that could trigger contribution under section 113. Thus, the only available mechanism for vindicating the right of contribution is section 107. Absent the ability to seek contribution from other responsible parties, the pace of cleanup at these sites would inevitably be delayed, a result the Government does not even address.

4. *Superfund Site Investigations.*

Curtailing the right of contribution also would prevent a responsible company from seeking equitable contribution toward the often considerable costs of investigating the nature and extent of contamination at a Superfund site and deter-

mining the most appropriate method of cleanup. These site studies, collectively referred to as a Remedial Investigation and Feasibility Studies ("RI/FS"), *see* 40 C.F.R. § 300.430 (2006), are essential to the development and selection of an appropriate cleanup plan, regardless of who will perform the actual cleanup. Typically, RI/FS take years to perform and cost millions of dollars.

Significantly, companies often perform these studies at an early stage in a site's history, long before the commencement (if any) of CERCLA litigation. EPA typically requires that the parties performing RI/FS to sign an administrative order on consent, issued under section 104 of CERCLA, which governs the performance of the work. *See* 42 U.S.C. § 9604. Prior to this Court's decision in *Cooper Industries*, responsible parties often sought contribution under section 113(f)(1) toward the costs of such studies. In the wake of *Cooper Industries*, however, that avenue is no longer available because such studies typically are performed long before any civil action is filed under section 106 or 107 (if any such action is ever filed).[30]

Thus, section 107 remains the only avenue for a responsible party to seek contribution toward the cost of performing the RI/FS. Absent that remedy, companies will be much less willing to perform these critical studies, pursuant to administrative orders on consent or otherwise. Either EPA will have to expend more of its limited resources to persuade and, if necessary, force companies through litigation to do the work, or the work will be unacceptably delayed. Neither

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[30] Some parties thus have sought contribution under section 113(f)(3)(B) instead. To date, however, these efforts have been unsuccessful. The lower courts have ruled that EPA administrative orders on consent do not qualify as CERCLA "settlements" that trigger contribution rights under section 113(f)(3)(B). *See, e.g., ITT Industries, Inc. v. BorgWarner, Inc.*, No. 1:05-CV-674, 2006 WL 2460793 (W.D. Mich. Aug. 23, 2006); *Pharmacia Corp. v. Clayton Chemical Acquisition LLC*, 382 F. Supp. 2d 1079 (S.D. Ill. 2005).

result comports with CERCLA's overriding objective. Yet the Government's brief fails to address the problems that would flow from its reading of section 107.

5. *Cleanups at Sites Addressed Under Section 106 Unilateral Administrative Orders.*

Finally, curtailing the right of contribution also would discourage and delay cleanups at another major category of sites not considered by the Government. These are the sites where EPA decides to issue unilateral administrative orders under section 106 of CERCLA to compel the performance of cleanup work. Denying contribution in these situations would be particularly illogical, unfair, and contrary to the goals of CERCLA.

For more than two decades, EPA has made extensive use of its authority to issue UAOs under section 106, issuing over 1,500 such orders to date. Because these orders carry extreme enforcement sanctions, including significant daily penalties and treble damages for noncompliance, they are exceptionally potent weapons. *See* 42 U.S.C. §§ 9606(b)(1), 9607(c)(3); 69 Fed. Reg. 7121 (Feb. 13, 2004). For this reason, EPA has described its authority to issue UAOs as a "unique" and "particularly effective enforcement tool, especially when compared to the penalties for noncompliance available under other [environmental] statutes." U.S. EPA/DOJ Memorandum, *Use of CERCLA § 106 to Address Endangerments That May Also Be Addressed Under Other Environmental Statutes* (Jan. 18, 2001), at 7, 9. Indeed, EPA has recognized that its authority to issue UAOs "is one of the most potent administrative remedies available under any existing environmental statute." U.S. EPA, *Guidance Memorandum on Use and Issuance of Administrative Orders Under Section 106(a) of CERCLA* (Sept. 8, 1983), at 2.

In employing UAOs to compel cleanups, EPA often has issued orders to companies that bear a relatively small share of responsibility for the contamination found at a site. In the

past, companies that performed cleanups under these orders were able to use section 113 to seek equitable contribution from others who were not named by EPA, or who were named but refused to comply. In the wake of *Cooper Industries*, however, several courts have held that contribution claims under section 113 are not available to recipients of section 106 orders.[31] *See, e.g., Pharmacia Corp*, 382 F. Supp. 2d at 1087 (dismissing contribution claim under section 113(f)(1) where plaintiff incurred cleanup expenses in response to UAO because "administrative orders do not qualify as a civil action under section 113(f)(1)"); *Blue Tee Corp. v. ASARCO, Inc.*, No. 03-5011, 2005 U.S. Dist. LEXIS 15360, at *12 (W.D. Mo. June 27, 2005) (dismissing contribution claim after determining there was no "civil action" because plaintiff conducted the cleanup under a UAO). Thus, section 107 may now be the only available mechanism to vindicate the right of contribution. As such, denying PRPs their statutory right to seek contribution under section 107 would be particularly harsh and unfair, especially for companies that already have incurred tremendous expenses cleaning up sites pursuant to section 106 orders. *See Akzo Coatings v. Aigner Corp.*, 30 F.3d 761, 769 (7th Cir. 1994) ("To subsequently preclude a compliant party from seeking contribution for the sums it has expended simply because it had the misfortune to be drafted by the EPA before a remedial plan could be prepared and a settlement negotiated will not expedite cooperative environmental remediation.").

It also would create a cruel dilemma for companies receiving future section 106 orders. If a PRP complies with the UAO, then under *Cooper Industries* it may forfeit the right to seek equitable contribution under section 113. If a PRP defies a UAO, then EPA can perform the cleanup itself

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[31] In *Cooper Industries*, the Court explicitly left open whether an administrative order under section 106 "would qualify as a 'civil action'" as required by section 113(f). 543 U.S. at 168 n.5.

and seek treble damages, plus fines amounting to nearly $12 million per year. Such a dysfunctional and perverse scheme is not the one enacted or intended by Congress.[32]

It may be suggested that the impact of denying contribution rights under section 107 in this context is lessened because the recipients of these UAOs could regain their lost contribution rights by requesting that EPA "convert" those orders into consent decrees under section 107, which would trigger the right to seek contribution under section 113. This approach would entail EPA first suing a UAO recipient under section 107, thereby triggering its contribution rights under section 113, and then simultaneously filing with the court a consent decree to resolve the new "litigation."

This convoluted approach has numerous flaws, and cannot possibly be what Congress intended. First, the recipient of an order may only request—not compel—EPA to "convert" its section 106 order into a consent decree. EPA may simply refuse, and the UAO recipient has no further recourse to save its contribution claim other than not complying with the UAO (with attendant exposure to daily penalties and treble damages). Second, EPA may agree to the "conversion" only in exchange for additional concessions, such as reimbursement of EPA's claimed past costs. Those costs may be substantial, and may be poorly documented and of questionable validity.

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[32] In addition, curtailing the use of section 107 as suggested by the Government would create the anomalous and potentially constitutionally-infirm situation where EPA's issuance of a UAO effectively would deny a PRP the ability to present a meaningful contribution claim, especially if a government agency was a contributor to the contamination. In practical terms, EPA would be able to extinguish the substantive right of contribution through unaccountable and unreviewed administrative action, and thus, at certain sites, immunize the United States from liability for its own contribution to the contaminated site. This prospect raises potentially constitutionally significant issues. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

Third, the standard EPA consent decree for Superfund cleanups includes waivers of significant legal rights, which should not be a prerequisite to exercising the right to seek equitable contribution. Fourth, even if EPA and the responsible parties were in complete agreement and wished to "convert" a section 106 order into a section 107 consent decree, doing so would burden the district courts with new section 107 complaints filed for the sole purpose of enabling parties that already are performing cleanups to exercise their statutory right to seek equitable contribution from other parties. Such litigation would be a waste of scarce judicial, administrative, and private sector resources. Curtailing the right of contribution under section 107 thus inevitably would discourage and delay cleanups under section 106 orders.

To summarize, the Eighth Circuit's decision recognizing the right of PRPs to seek equitable contribution under section 107 should be affirmed. The Government's constrained reading of section 107, on the other hand, contradicts EPA's duly-promulgated regulations interpreting that provision, as well as EPA's long-standing policy of encouraging private parties to initiate cleanups in order to fulfill CERCLA's broad remedial purpose.

Moreover, the Government's reading of section 107 would discourage or delay cleanups at many thousands of contaminated sites around the country. At sites polluted by the Federal Government, private parties would have no incentive to shoulder the burden of cleanup and would instead wait to be sued under CERCLA. As a result, the options for EPA and its state counterparts boil down to more litigation or slower cleanups—or both. Similarly, companies will not voluntarily clean up brownfields sites for fear that they will have no right to recoup their costs from others. Moreover, owners at RCRA corrective action sites would be reluctant to begin performing multi-year cleanups under permits or administrative orders, and would have no incentive to maintain the pace of those cleanups once they were underway. Com-

panies involved at Superfund sites may decline to perform RI/FS, ultimately delaying cleanup of those sites. Finally, companies that receive section 106 orders from EPA would face a difficult dilemma, as the penalties for defying a UAO are severe and complying with a section 106 order may risk forfeiting the right to seek contribution under section 113.

In each of these contexts, restricting the right of contribution under section 107 would have extremely detrimental consequences and would undermine the incentives for private sector cooperation that EPA has leveraged so successfully. These results fly in the face of what Congress sought to achieve by enacting—and amending—CERCLA. The sheer magnitude of these consequences underscores the need for this Court to consider how its decision will impact not just the particular sites at issue in this case, but also the many thousands of sites around the country where it is absolutely necessary that parties initiating a voluntary cleanup be able to seek contribution from other liable parties. Accordingly, *amici curiae* urge this Court to affirm the decision of the Eighth Circuit.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the brief of respondent, the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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FILED
MAR 1 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(24)

No. 06-562

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC RESEARCH CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: OCT. 24, 2006
CERTIORARI GRANTED: JAN. 19, 2007

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UNITED STATES DISTRICT COURT
FOR THE EIGHTH CIRCUIT

No. 05-3152

ATLANTIC RESEARCH CORPORATION, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DOCKET ENTRIES

DATE	PROCEEDINGS
08/08/2005	Civil Case Docketed. Dist. Ct. Office: El Dorado, AR
	* * * * *
09/09/2005	RECORDS received: Transcript, consisting of 1 Volume of proceedings held on 5/12/2005. Location STL. [05-3152]
	* * * * *
10/13/2005	BRIEF FILED - Brief of Appellant - Atlantic Research. 12,803 words w/addendum 10 copies - w/service 10/12/05 w/ cdrom. [05-3152] [1963538]
	* * * * *

DATE	PROCEEDINGS
12/06/2005	BRIEF FILED - Brief of Appellee - USA. 13,933 words - 10 copies - w/service 12/5/05 w/CDROM [05-3152] [1982955]
12/06/2005	RECORDS received: Appendix filed by Appellee USA consisting of 1 Volume(s), 4 Copies. [05-3152]
	* * * * *
12/27/2005	BRIEF FILED - Reply brief - Atlantic Research. 5,589 words 10 copies - w/service 12/21/05. w/CD [05-3152] [1990456]
	* * * * *
03/16/2006	ARGUED AND SUBMITTED IN ST. LOUIS, MISSOURI TO JUDGES Roger L. Wollman, Circuit Judge, William J. Riley, Circuit Judge, James M. Rosenbaum, Visiting Judge, District of Minnesota. Thomas Armstrong for Appellant Atlantic Research. Ronald M. Spritzer for Appellee USA. Rebuttal by: Mr. Armstrong. RECORDED. [05-3152]
	* * * * *
08/11/2006	THE COURT: Roger L. Wollman, William J. Riley, James M. Rosenbaum. OPINION FILED by James M. Rosenbaum, Authoring Judge PUBLISHED. [05-3152] [2077355]

DATE	PROCEEDINGS
08/11/2006	JUDGMENT: Roger L. Wollman, William J. Riley, James M. Rosenbaum: The judgment of the lower court is REVERSED in accordance with the opinion. [05-3152] [2077358]

* * * * *

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF ARKANSAS

No. 02-CV-01199-HFB

UNITED STATES OF AMERICA, DEFENDANT

v.

ATLANTIC RESEARCH CORPORATION, INC.,
PLAINTIFF

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
12/12/2002	1	COMPLAINT (2 Summons(es) issued & retd to atty f/svc) (cn) (Entered: 12/13/2002)
	* * * * *	
02/18/2003	6	ANSWER by defendant USA [1-1] (cn) (Entered: 02/18/2003)
	* * * * *	
12/23/2004	24	MOTION by plaintiff Atlantic Research to amend complt (cn) (Entered: 12/23/2004)
	* * * * *	

DATE	DOCKET NUMBER	PROCEEDINGS
12/23/2004	26	AMENDED COMPLAINT [1-1] by plaintiff Atlantic Research (cn) (Entered: 12/23/2004)
	* * * * *	
01/26/2005	28	MOTION by defendant USA to dismiss f/failure to state a claim (cn) (Entered: 01/26/2005)
01/26/2005	29	MEMORANDUM BRIEF by defendant USA in support of motion to dismiss f/failure to state a claim [28-1] (cn) (Entered: 01/26/2005)
	* * * * *	
02/17/2005	32	RESPONSE/BRIEF/OPPOSITION by plaintiff Atlantic Research to motion to dismiss f/failure to state a claim [28-1] (cn) (Entered: 02/17/2005)
	* * * * *	

DATE	DOCKET NUMBER	PROCEEDINGS
03/08/2005	35	REPLY MEMORANDUM by defendant USA in support of motion to dismiss f/failure to state a claim [28-1] (mfr) (Entered: 03/08/2005)
	* * * * *	
05/02/2005	37	SUPPLEMENT by defendant USA re motion to dismiss f/failure to state a claim [28-1] (cn) (Entered: 05/02/2005)
05/12/2005	38	CLERK'S NOTES: hearing held 9:00am 5/12/05 on motion to dismiss f/failure to state a claim [28-1] (cn) (Entered: 05/16/2005)
	* * * * *	
06/01/2005	40	MEMORANDUM OPINION: by Honorable Harry F. Barnes (cc: all counsel) (cn) (Entered: 06/01/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
06/01/2005	41	ORDER by Honorable Harry F. Barnes granting motion to dismiss f/failure to state a claim [28-1] dismissing case (cc: all counsel) (cn) (Entered: 06/01/2005)
07/28/2005	42	NOTICE OF APPEAL by plaintiff Atlantic Research from District Court decision re: order [41-2] dated 6/1/05 (cc: opposing counsel) (cn) (Entered: 07/29/2005)
		* * * * *
09/07/2005		TRANSCRIPT of Proceedings held on May 12, 2005 before Judge Harry F. Barnes. Court Reporter: Donna McKinney. (cnn) (TEXT ENTRY ONLY NO DOCUMENT ATTACHED) (Entered: 09/07/2005)
		* * * * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

No. 02-1199

ATLANTIC RESEARCH CORPORATION, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Dec. 12, 2002]

COMPLAINT

Plaintiff, Atlantic Research Corporation, by its undersigned Counsel, alleges the following against Defendant, the United States of America.

NATURE OF THE ACTION

1. Plaintiff brings this action under Sections 107(a) and 113(f) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601 *et seq.* ("CERCLA").

2. Plaintiff seeks to recover from the Defendant necessary costs of response Plaintiff has incurred consistent with the National Contingency Plan, 40 C.F.R. Part 300, caused by the release or threatened release of hazardous substances at a facility in Camden, Arkansas. Plaintiff also seeks a declaratory judgment on liability for response costs pursuant to 28 U.S.C. §§ 2201 and 2202 and CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2), declaring Plaintiff's right to recover past and future response costs

for the release of hazardous substances at and/or from its Camden facility.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action under Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and under 28 U.S.C. § 1331. In addition, the Declaratory Judgment Act, 28 U.S.C. § 2201, and Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), authorize this Court to grant Plaintiff declaratory relief.

4. Venue in this Court is proper pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), because the releases or threatened releases alleged herein occurred within the Western District of Arkansas.

PARTIES

5. Plaintiff, Atlantic Research Corporation("ARC"), is a corporation duly organized and existing under the laws of the State of Delaware with its principal place of business at 5945 Wellington Road, Gainesville, Virginia 20155. ARC is a wholly owned subsidiary of Chromalloy Gas Turbine Corporation, a corporation duly organized and existing under the laws of the State of Delaware with its principle place of business at 200 Park Avenue, New York, New York, 10166. Chromalloy Gas Turbine Corporation is a wholly-owned subsidiary of Chromalloy American Corporation, a corporation duly organized and existing under the laws of the State of Delaware with its principle place of business at 200 Park Avenue, New York, New York, 10166, which in turn is a wholly-owned subsidiary of Sequa Corporation, a corporation duly organized and existing under the laws of the State of Delaware with its principal place of business at 200 Park Avenue, New York, New

York 10166. Plaintiff is a "person" as the term is defined under Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

6. The United States of America ("United States" or "Government") has been named as a defendant on the basis of actions undertaken by its departments, agencies, and instrumentalities, including the following: the United States Department of Defense ("DOD"), the United States Department of the Army, and the United States Army Missile Command.

BACKGROUND

7. ARC has leased property in the Highland Industrial Park in Camden, Arkansas since approximately 1979 ("Camden Site").

8. The Highland Industrial Park, currently owned by Highland Industrial Park, Inc., was originally part of the Shumaker Naval Ammunition Depot, a DOD facility.

9. At the Camden Site, ARC has operated both as a prime contractor to DOD and as a subcontractor for other companies who have contracted directly with the United States.

10. One of the first prime contracts secured by ARC to be performed at the Camden Site involved the Chaparral rocket motor program.

11. The United States had previously contracted with a third-party for the production of Chaparral rockets, which utilized a propellant containing ammonium perchlorate ("AP"). Notwithstanding that thousands of these rockets had been produced and delivered in conformance with the contract terms, the United States determined that it could not deploy them in the field because of the contrails produced by the AP propellant.

12. As a consequence, the United States developed (through a government contract) a new "smokeless" rocket that used a double-based propellant that did not contain AP.

13. The Army then issued a Request for Proposal for the retrofitting of the existing Chaparral rocket motors. ARC responded to the RFP and was awarded Contract No. DAAH01-81-C-B047 ("Contract").

14. The Contract was executed and effective July 31, 1981 and ran until 1986. The Contract called for ARC to retrofit approximately 3,245 rocket motors by removing AP-based propellant and replacing it with the new double-based propellant.

15. Upon information and belief, ARC ultimately retrofitted approximately 4,500 to 5,000 rocket motors pursuant to the Contract.

16. Under the Contract, the United States arranged for the delivery of the Government-owned unfired rocket motors containing AP-based propellant to the Camden Site.

17. The Government-owned unfired rocket motors were delivered to the Camden Site as Government Furnished Equipment.

18. Under the Contract, ARC was tasked with removing the AP-based propellant from the rocket motors so that they could be refilled with the non-AP propellant.

19. To remove the AP-based propellant, ARC constructed Building 52 where it installed and used washout equipment (principally a high pressure water spray system). Building 52 was constructed and the washout equipment was developed, installed, and used specifically for the Chaparral Contract.

20. Using the high pressure water spray system, ARC removed the AP-based propellant from the rocket motors.

21. The high pressure water caused pieces of propellant to break off the motor. These pieces were captured by a filter, while propellant-contaminated wastewater drained through the filter into a catch basin.

22. Propellant-contaminated wastewater also splashed out of the front end of the rocket motor. Some of this propellant-contaminated wastewater that splashed out the front end fell onto the concrete, where it was channeled into drains that led to an underground sump, which was emptied several times per week.

23. The remainder of this propellant-contaminated wastewater that splashed out the front end of the rocket motor was released to the environment by flowing and spraying directly onto the gravel outside Building 52.

24. The release of the propellant contaminated wastewater from the rocket motors and Building 52 contaminated soil and groundwater.

25. The pieces of propellant captured on the filter, as well as the propellant-contaminated wastewater captured in the catch basin and sump, were collected and transported to an on-site open burning unit ("OBU"), where they periodically were burned.

26. This burning process was authorized by a permit issued by the Arkansas Department of Pollution Control and Ecology (later referred to as the Arkansas Department of Environmental Quality).

27. This burning process was operated in a manner that was consistent with the permit requirements.

28. Some portion of the solid propellant pieces and propellant-contaminated wastewater was released to the environment from the OBU.

29. The release of the propellant pieces and propellant-contaminated wastewater from the OBU contaminated soil and groundwater.

30. Propellant contamination has been detected in soil and groundwater at and under Building 52 and the OBU.

EXTENT OF GOVERNMENT INVOLVEMENT

31. The Government intended that propellant waste would be generated pursuant to the terms of the Contract.

32. The Government knew that propellant waste would be generated pursuant to ARC's work under the Contract.

33. The Government intended that propellant waste would be disposed at the Camden Site pursuant to the terms of the Contract.

34. The Government had actual knowledge of the fact and manner of the disposal of the propellant waste.

35. The Government had constructive knowledge of the fact and manner of the disposal of the propellant waste.

36. The Contract incorporated the specifications for the washout procedures at Building 52 and the treatment and disposal procedures utilized at the OBU.

37. The Government approved the specifications for the washout procedures at Building 52 and the treatment and disposal procedures to be utilized at the OBU.

38. The Government knew that the propellant removed from the motors during the high pressure water spray operation would be collected by filters and collection tanks.

39. The Government knew that the propellant removed from the motors during the high pressure water spray operation would be transferred from the filters and collection tanks to an OBU.

40. DOD personnel, including Defense Contract Administration Services ("DCAS") representatives, were present at the Camden Site several times a week.

41. DOD personnel, including DCAS representatives, personally observed ARC's performance under the Contract.

42. DOD personnel, including DCAS representatives, personally observed ARC's waste handling procedures, including operations at Building 52 and the OBU, with regard to the propellant removed from the rocket motors pursuant to the Contract.

43. The Government furnished and retained title to the rocket motors provided to ARC at the Camden Site under the Chaparral program.

44. The Government owned the work in progress being performed under the Contract.

45. The Government owned the completed refurbished rocket motors under the Contract.

46. The Government owned the propellant removed from the rocket motors and released to the environment.

47. The work performed by ARC pursuant to the Contract was performed for the Government's benefit.

48. The work performed by ARC pursuant to the Contract was performed at the Government's direction.

49. The Government controlled the quantities of propellant waste generated via the Government's control over the quantity of propellant contained in each rocket and the number of rockets sent to ARC for propellant removal and disposal.

50. The Government controlled the quantities of propellant waste disposed via the Government's control over the quantity of propellant contained in each rocket and the number of rockets sent to ARC for propellant removal and disposal.

51. The Government selected the Camden Site as the location at which disposal of the waste propellant would occur.

52. The Government exercised pervasive control over the rocket and missile systems industry.

53. The Government exercised pervasive control over AP production and use in the United States.

54. The Government supplied, as Government Furnished Property ("GFP"), certain components of the new, double-based propellant ARC loaded into the rocket motors after removal of the AP-based propellant. This GFP included, at a minimum, HMX and, upon information and belief, RDX.

55. The vast majority of AP disposed at the Site is attributable to ARC's work performed for the Government.

CERCLA CONTRIBUTION

56. Plaintiff repeats and realleges as if fully set forth herein the allegations contained in Paragraphs 1 through 55 of this Complaint.

57. ARC's Camden Site is a "facility" within the meaning of CERCLA § 101(9), 42 U.S.C. § 9601(9).

58. Building 52 is a "facility" within the meaning of CERCLA § 101(9), 42 U.S.C. § 9601(9).

59. The OBU is a "facility" within the meaning of CERCLA § 101(9), 42 U.S.C. § 9601(9).

60. Each of the rocket motors provided to ARC for refurbishment under the Contract is a "facility" within the meaning of CERCLA § 101(9), 42 U.S.C. § 9601(9).

61. The United States is a "person" as that term is defined under Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

62. The propellant removed from the rocket motors and disposed at the Camden Site is a "hazardous sub-

stance" within the meaning of CERCLA § 101(14), 42 U.S.C. § 9601(14).

63. The propellant removed from the rocket motors and disposed at the Camden Site is a "hazardous waste" pursuant to the Solid Waste Disposal Act, 42 U.S.C. § 6901 *et seq.*

64. The presence of propellant constituents in the soil and groundwater at the Camden Site constitutes a "release" or "threatened release" of "hazardous substances" within the meaning of CERCLA §§ 101(14) and (22), 42 U.S.C. §§ 9601(14) and (22).

65. ARC has undertaken, and will continue to undertake, investigations and response actions in connection with the Camden facility in response to releases or threatened releases of hazardous substances, and has incurred and is expecting to incur necessary costs of response consistent with the National Contingency Plan.

66. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2), because the United States "owned" the rocket motors at the time hazardous substances were disposed from the motors.

67. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2), because the United States was an "operator" of the Camden Site at the time hazardous substances were disposed at the Camden Site.

68. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2), because the United States was an "operator" of the rocket motors at the time hazardous substances were disposed from the motors.

69. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), because the United States is a person who by contract "arranged" for the disposal or treatment of hazardous substances owned by it at the Camden Site.

70. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), because the United States is a person who "arranged" with a transporter for transport for disposal or treatment of hazardous substances owned by the United States at the Camden Site.

71. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), because the United States is a person who "arranged" for the refurbishment of its rocket motors knowing that the generation and disposal of wastes containing hazardous substances was inherent in the refurbishment process.

72. The United States is liable to ARC for contribution under CERCLA § 113(f), 42 U.S.C. § 9613(f), because the United States is a "person who is liable or potentially liable" under CERCLA § 107(a), 42 U.S.C. § 9607(a).

73. Pursuant to CERCLA § 113(f), 42 U.S.C. § 9613(f), ARC is entitled to contribution from the United States in connection with the Camden Site for the United States' equitable share of the response costs incurred by ARC. The Court should allocate the costs between the United States and ARC using such equitable factors as the Court determines are appropriate.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff ARC demands judgment in its favor and against the Defendant United States as follows:

1) Declaring Defendant strictly liable for necessary response costs, consistent with the National Contingency Plan, relating to the Camden Site, such judgment to be binding on any subsequent action or actions to recover further response costs or damages;

2) Declaring Defendant liable to Plaintiff pursuant to CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1), for contribution for the necessary costs of response, incurred or to be incurred by Plaintiff in connection with the Camden Site;

3) Ordering Defendant to pay its share of contribution for necessary response costs, consistent with the National Contingency Plan, thus far incurred by Plaintiff in connection with the Camden Site;

4) Declaring Defendant liable for its share of contribution for necessary response costs, consistent with the National Contingency Plan, incurred in the future by Plaintiff in connection with the Camden Site;

5) Awarding Plaintiff interest and costs of suit, including reasonable attorneys' fees; and

6) Awarding Plaintiff such other relief as the Court may deem just and proper.

Respectfully submitted,

/s/ ROBERT A. MATTHEWS
ROBERT A. MATTHEWS
Scott E. Kauff
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(202) 496-7500

/s/ FLOYD M. THOMAS JR.
FLOYD M. THOMAS, JR.
(Ark Bar. No. 74145)
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El Dorado, Ark. 71730-0032
(870) 862-3478

Attorneys for Plaintiff Atlantic
Research Corporation

Date: December 12, 2002

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

C.A. No. 02-1199

ATLANTIC RESEARCH CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Dec. 23, 2004]

AMENDED COMPLAINT

Plaintiff, Atlantic Research Corporation, by its undesigned Counsel, alleges the following against Defendant, the United States of America.

NATURE OF THE ACTION

1. Plaintiff brings this action under Sections 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601 *et seq.* ("CERCLA").

2. Plaintiff seeks to recover from the Defendant necessary costs of response Plaintiff has incurred consistent with the National Contingency Plan, 40 C.F.R. Part 300, caused by the release or threatened release of hazardous substances at a facility in Camden, Arkansas. Plaintiff also seeks a declaratory judgment on liability for response costs pursuant to 28 U.S.C. §§ 2201 and 2202 and CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2), declaring Plaintiff's right to recover past response costs

for the release of hazardous substances at and/or from its Camden facility.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action under Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and under 28 U.S.C. § 1331. In addition, the Declaratory Judgment Act, 28 U.S.C. § 2201, and Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), authorize this Court to grant Plaintiff declaratory relief.

4. Venue in this Court is proper pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), because the releases or threatened releases alleged herein occurred within the Western District of Arkansas.

PARTIES

5. Plaintiff, Atlantic Research Corporation ("ARC"), is a corporation duly organized and existing under the laws of the State of Delaware with its principal place of business at 5945 Wellington Road, Gainesville, Virginia 20155. ARC is a wholly owned subsidiary of Chromalloy Gas Turbine Corporation, a corporation duly organized and existing under the laws of the State of Delaware with its principle place of business at 200 Park Avenue, New York, New York 10166. Chromalloy Gas Turbine Corporation is a wholly-owned subsidiary of Chromalloy American Corporation, a corporation duly organized and existing under the laws of the State of Delaware with its principle place of business at 200 Park Avenue, New York, New York, 10166, which in turn is a wholly-owned subsidiary of Sequa Corporation, a corporation duly organized and existing under the laws of the State of Delaware with its principal place of business at 200 Park Avenue, New York, New York 10166. Plaintiff is a "person" as the term

is defined under Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

6. The United States of America ("United States" or "Government") has been named as a defendant on the basis of actions undertaken by its departments, agencies, and instrumentalities, including the following: the United States Department of Defense ("DOD"), the United States Department of Army, and the United States Army Missile Command.

BACKGROUND

7. At all times relevant to this Complaint, ARC leased property in the Highland Industrial Park in Camden, Arkansas beginning in approximately 1979 and lasting until October 2003 ("Camden Site").

8. The Highland Industrial Park, currently owned by Highland Industrial Park, Inc., was originally part of the Shumaker Naval Ammunition Depot, a DOD facility.

9. At the Camden Site, ARC operated both as a prime contractor to DOD and as a subcontractor for other companies who have contracted directly with the United States.

10. One of the first prime contracts secured by ARC to be performed at the Camden Site involved the Chaparral rocket motor program.

11. The United States had previously contracted with a third-party for the production of Chaparral rockets, which utilized a propellant containing ammonium perchlorate ("AP"). Notwithstanding that thousands of these rockets had been produced and delivered in conformance with the contract terms, the United States determined that it could not deploy them in the field because of the contrails produced by the AP propellant.

12. As a consequence, the United States developed (through a government contract) a new "smokeless" rocket that used a double-based propellant that did not contain AP.

13. The Army then issued a Request for Proposal for the retrofitting of the existing Chaparral rocket motors. ARC responded to the RFP and was awarded Contract No. DAAH01-81-C-B047 ("Contract").

14. The Contract was executed and effective July 31, 1981 and ran until 1986. The Contract called for ARC to retrofit approximately 3,245 rocket motors by removing AP-based propellant and replacing it with the new double-based propellant.

15. Upon information and belief, ARC ultimately retrofitted approximately 4,500 to 5,000 rocket motors pursuant to the Contract.

16. Under the Contract, the United States arranged for the delivery of the Government-owned unfired rocket motors containing AP-based propellant to the Camden Site.

17. The Government-owned unfired rocket motors were delivered to the Camden Site as Government Furnished Equipment.

18. Under the Contract, ARC was tasked with removing the AP-based propellant from the rocket motors so that they could be refilled with the non-AP propellant.

19. To remove the AP-based propellant, ARC constructed Building 52 where it installed and used washout equipment (principally a high pressure water spray system). Building 52 was constructed and the washout equip-

ment was developed, installed, and used specifically for the Chaparral Contract.

20. Using the high pressure water spray system, ARC removed the AP-based propellant from the rocket motors.

21. The high pressure water caused pieces of propellant to break off the motor. These pieces were captured by a filter, while propellant-contaminated wastewater drained through the filter into a catch basin.

22. Propellant-contaminated wastewater also splashed out of the front end of the rocket motor. Some of this propellant-contaminated wastewater that splashed out the front end fell onto the concrete, where it was channeled into drains that led to an underground sump, which was emptied several times per week.

23. The remainder of this propellant-contaminated wastewater that splashed out the front end of the rocket motor was released to the environment by flowing and spraying directly onto the gravel outside Building 52.

24. The release of the propellant-contaminated wastewater from the rocket motors and Building 52 contaminated soil and groundwater.

25. The pieces of propellant captured on the filter, as well as the propellant-contaminated wastewater captured in the catch basin and sump, were collected and transported to an on-site open building unit ("OBU"), where they periodically were burned.

26. This burning process was authorized by a permit issued by the Arkansas Department of Pollution Control and Ecology (later referred to as the Arkansas Department of Environmental Quality).

27. This burning process was operated in a manner that was consistent with the permit requirements.

28. Some portion of the solid propellant pieces and propellant-contaminated wastewater was released to the environment from the OBU.

29. The release of the propellant pieces and propellant-contaminated wastewater from the OBU contaminated soil and groundwater.

30. Propellant contamination has been detected in soil and groundwater at and under Building 52 and the OBU.

EXTENT OF GOVERNMENT INVOLVEMENT

31. The Government intended that propellant waste would be generated pursuant to the terms of the Contract.

32. The Government knew that propellant waste would be generated pursuant to ARC's work under the Contract.

33. The Government intended that propellant waste would be disposed at the Camden Site pursuant to the terms of the Contract.

34. The Government had actual knowledge of the fact and manner of the disposal of the propellant waste.

35. The Government had constructive knowledge of the fact and manner of the disposal of the propellant waste.

36. The Contract incorporated the specifications for the washout procedures at Building 52 and the treatment and disposal procedures utilized at the OBU.

37. The Government approved the specifications for the washout procedures at Building 52 and the treatment and disposal procedures to be utilized at the OBU.

38. The Government knew that the propellant removed from the motors during the high pressure water spray operation would be collected by filters and collection tanks.

39. The Government knew that the propellant removed from the motors during the high pressure water spray operation would be transferred from the filters and collection tanks to an OBU.

40. DOD personnel, including Defense Contract Administration Services ("DCAS") representatives, were present at the Camden Site several times a week.

41. DOD personnel, including DCAS representatives, personally observed ARC's performance under the Contract.

42. DOD personnel, including DCAS representatives, personally observed ARC's waste handling procedures, including operations at Building 52 and the OBU, with regard to the propellant removed from the rocket motors pursuant to the Contract.

43. The Government furnished and retained title to the rocket motors provided to ARC at the Camden Site under the Chaparral program.

44. The Government owned the work in progress being performed under the Contract.

45. The Government owned the completed refurbished rocket motors under the Contract.

46. The Government owned the propellant removed from the rocket motors and released to the environment.

47. The work performed by ARC pursuant to the Contract was performed for the Government's benefit.

48. The work performed by ARC pursuant to the Contract was performed at the Government's direction.

49. The Government controlled the quantities of propellant waste generated via the Government's control over the quantity of propellant contained in each rocket and the number of rockets sent to ARC for propellant removal and disposal.

50. The Government controlled the quantities of propellant waste disposed via the Government's control over the quantity of propellant contained in each rocket and the number of rockets sent to ARC for propellant removal and disposal.

51. The Government selected the Camden Site as the location at which disposal of the waste propellant would occur.

52. The Government exercised pervasive control over the rocket and missile systems industry.

53. The Government exercised pervasive control over AP production and use in the United States.

54. The Government supplied, as Government Furnished Property ("GFP"), certain components of the new, double-based propellant ARC loaded into the rocket motors after removal of the AP-based propellant. This GFP included, at a minimum, HMX and, upon information and belief, RDX.

55. The vast majority of AP disposed at the Site is attributable to ARC's work performed for the Government.

COUNT I: OWNER LIABILITY

56. Plaintiff repeats and realleges as if fully set forth herein the allegations contained in Paragraph 1 through 55 of this Amended Complaint.

57. The Camden Site is a "facility" within the meaning of CERCLA § 101(9), 42 U.S.C. § 9601(9).

58. Building 52 is a "facility" within the meaning of CERCLA § 101(9), 42 U.S.C. § 9601(9).

59. The OBU is a "facility" within the meaning of CERCLA § 101(9), 42 U.S.C. § 9601(9).

60. Each of the rocket motors provided to ARC for refurbishment under the Contract is a "facility" within the meaning of CERCLA § 101(9), 42 U.S.C. § 9601(9).

61. The United States is a "person" as that term is defined under Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

62. The propellant removed from the rocket motors and disposed at the Camden Site is a "hazardous substance" within the meaning of CERCLA § 101(14), 42 U.S.C. § 9601(14).

63. The propellant removed from the rocket motors and disposed at the Camden Site is a "hazardous waste" pursuant to the Solid Waste Disposal Act, 42 U.S.C. § 6901 *et seq.*

64. The presence of propellant constituents in the soil and groundwater at the Camden Site constitutes a "release" or "threatened release" of "hazardous substances" within the meaning of CERCLA §§ 101(14) and (22), 42 U.S.C. §§ 9601(14) and (22).

65. ARC has undertaken investigations and response actions in connection with the Camden facility in response to releases or threatened releases of hazardous substances, and has incurred necessary costs of response consistent with the National Contingency Plan.

66. Under CERCLA § 107(a), 42 U.S.C. § 9607(a), persons who owned a facility at the time of disposal of hazardous substances are liable for necessary costs of responding to a release or threatened release of hazardous substances incurred by any person consistent with the NCP.

67. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2), because the United States "owned" the rocket motors at the time hazardous substances were disposed from the motors.

COUNT II: OPERATOR LIABILITY

68. Plaintiff repeats and realleges as if fully set forth herein the allegations contained in Paragraph 1 through 67 of this Amended Complaint.

69. Under CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2), persons who operated a facility at the time of disposal of hazardous substances are liable for necessary costs of responding to a release or threatened release of hazardous substances incurred by any person consistent with the NCP.

70. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2), because the United States was an "operator" of the Camden Site at the time hazardous substances were disposed at the Camden Site.

71. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2), because the United States was an "operator" of the rocket motors at the time hazardous substances were disposed from the motors.

COUNT III: ARRANGER LIABILITY

72. Plaintiff repeats and realleges as if fully set forth herein the allegations contained in Paragraphs 1 through 71 of this Amended Complaint.

73. Under CERCLA § 107(a), 42 U.S.C. § 9607(a), persons who arranged for disposal of hazardous substances at a facility are liable for necessary costs of responding to a release or threatened release of hazardous substances incurred by any person consistent with the NCP.

74. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), because the United States is a person who by contract "arranged" for the disposal or treatment of hazardous substances owned by it at the Camden Site.

75. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), because the United States is a person who "arranged" with a transporter for transport for disposal or treatment of hazardous substances owned by the United States at the Camden Site.

76. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), because the United States is a person who "arranged" for the refurbishment of its rocket motors knowing that the generation and disposal of wastes con-

taining hazardous substances was inherent in the refurbishment process.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff ARC demands judgment in its favor and against the Defendant United States as follows:

1) Declaring Defendant strictly liable for necessary response costs, consistent with the National Contingency Plan, relating to the Camden Site;

2) Declaring Defendant liable as a former owner, a former operator, and an arranger to Plaintiff pursuant to CERCLA § 107(a), 42 U.S.C. § 9607(a), for the necessary costs of response incurred by Plaintiff in connection with the Camden Site;

3) Awarding Plaintiff response costs incurred to date by Plaintiff, under CERCLA § 107(a) and/or federal common law, such amount to be determined at trial;

4) Awarding Plaintiff interest and costs of suit, including reasonable attorneys' fees; and

5) Awarding Plaintiff such other relief as the Court may deem just and proper.

Respectfully submitted,

COMPTON, PREWETT, THOMAS AND HICKEY, P.A.
423 N. Washington Ave.
El Dorado, Ark. 71730-0032
(870) 862-3478

By: /s/ FLOYD M. THOMAS, JR.
FLOYD M. THOMAS JR.
Attorney for Atlantic Research Corp.

CERTIFICATE OF SERVICE

I, Floyd M. Thomas, Jr. hereby certify that on December ____, 2004, the foregoing Motion for Leave to File Amended Complaint was served by first class mail, postage prepaid, on the following:

THOMAS L. SANSONETTI
Assistant Attorney General
Environmental & Natural Resources Division
MICHELLE L. WALTER
Environmental Defense Section
United States Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

TOM GEAN
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LARRY McCORD
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LTC MICHEL GRAHAM
Environmental Law Division
United States Army
901 N. Stuart St., Suite 400
Arlington, VA 20003

/s/ FLOYD M. THOMAS, JR.
FLOYD M. THOMAS, JR.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

C.A. No. 02-1199

ATLANTIC RESEARCH CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Dec. 23, 2004]

MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Plaintiff Atlantic Research Corporation ("Plaintiff") seeks leave of this Court to file a First Amended Complaint, as provided for in Fed. R. Civ. Proc. 15. A copy of the proposed First Amended Complaint is attached to this Motion.

The filing of an amended complaint in this matter was necessitated by the decision issued by the Supreme Court on December 13, 2004 in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 534 U.S. ____,____S. Ct.___, No. 02-1192, WL 2847713 (U.S. Dec. 13, 2004) ("*Aviall*") [a copy of which is attached to this Motion]. Under *Aviall*, the Supreme Court held that under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601, *et seq.* ("CERCLA"), a private party who has not been sued under CERCLA Section 106 or 107 may not bring an action in contribution against other par-

ties under CERCLA Section 113(f)(1). The Supreme Court affirmatively declined, however, to resolve whether a similarly situated private party may seek to recover costs it has incurred under CERCLA Section 107(a). As a consequence, private party cost recovery claims under CERCLA Section 107(a) remain viable.

Plaintiff's original Complaint in the matter before this Court invokes both Sections 107(a) and 113(f)(1) as the bases for its claims for recovery of environmental remediation costs from defendant United States of America ("United States" or "Defendant"). Under *Aviall*, the Section 113(f)(1) claim may no longer be maintained. Plaintiff now seeks to file the First Amended Complaint in order to establish CERCLA § 107(a) as the basis for Plaintiff's claim for recovery of environmental remediation costs it has incurred.

The proposed First Amended Complaint clarifies two other points. First, since the filing of the original Complaint, Plaintiff has been acquired; as a result, and as reflected in the First Amended Complaint, Plaintiff no longer leases the contaminated property in question. Second, as a consequence of the first point, through the First Amended Complaint Plaintiff seeks recovery only of Environmental remediation costs Plaintiff has incurred in the past.

Plaintiff has consulted with counsel for the United States, and is informed the United States has no objection to the filing of the First Amended Complaint so long as Plaintiff supports the request of the United States for an extension of the time for the Defendant to Answer the First Amended Complaint. Plaintiff does support the request of the United States, and would direct the Court's

attention to the recent Joint Notice filed by the parties, which also addresses this issue.

Respectfully submitted,

COMPTON, PREWETT, THOMAS & HICKEY, LLP
423 North Washington
El Dorado, AR 71730
(870) 862-3478

BY: /s/ FLOYD M. THOMAS, JR.
FLOYD M. THOMAS, JR. #74-145
Attorney for Plaintiff Atlantic Research Corporation

CERTIFICATE OF SERVICE

I, Floyd M. Thomas, Jr. hereby certify that on December 23 2004, the foregoing Motion for Leave to File Amended Complaint was served by first class mail, postage prepaid, on the following:

THOMAS L. SANSONETTI
Assistant Attorney General
Environmental & Natural Resources Division
MICHELLE L. WALTER
Environmental Defense Section
United States Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

TOM GEAN
United States Attorney
LARRY McCORD
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Fort Smith, AR 72901

LTC MICHEL GRAHAM
Environmental Law Division
United States Army
901 N. Stuart St., Suite 400
Arlington, VA 20003

/s/ FLOYD M. THOMAS, JR.
FLOYD M. THOMAS, JR.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

Case No. 02-CV-1199

ATLANTIC RESEARCH CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Jan. 26, 2005]

DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Defendant, the United States of American ("United States") moves to dismiss Plaintiff's Amended Complaint, filed December 23, 2004, under Fed. R. Civ. P. 12 (b)(6) for failure to state a claim upon which relief can be granted. Pursuant to LR7.2(a), the arguments supporting this motion are contained in the accompanying Defendant's Memorandum in Support of Motion to Dismiss for Failure to State a Claim.

Respectfully submitted,

THOMAS L. SANSONETTI
Assistant Attorney General
Environment and Natural Resources Division

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BRYAN T. BROYLES
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ROBERT C. BALFE
United States Attorney

/s/ LARRY McCORD
LARRY MCCORD
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Counsel for the United States of America

OF COUNSEL FOR THE UNITED STATES:

LTC Michael D. Graham
Environmental Law Division
U.S. Army Legal Services Agency
901 N Stuart St. Suite 400
Arlington, VA 22203-1867
(703) 696-1596

DATED: January 24, 2005

CERTIFICATE OF SERVICE

I, Larry R. McCord, Assistant U.S. Attorney for the Western District of Arkansas, hereby certify that a true and correct copy of the foregoing pleading was mailed this 24 day of January, 2005 to:

ROBERT A. MATTHEWS
SCOTT E. KAUFF
McKenna Long & Aldridge LLP
1900 K Street NW
Washington, DC 20006

FLOYD M. THOMAS JR.
Compton, Prewett, Thomas and Hickey, P.A.
423 N. Washington Ave.
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El Dorado, AR 71730-0032

/s/ LARRY R. McCORD
LARRY R. MCCORD
Assistant United States
Attorney

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

Case No. 02-CV-1199

ATLANTIC RESEARCH CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Jan. 26, 2005]

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

INTRODUCTION

Plaintiff Atlantic Research Corporation ("ARC") originally brought this lawsuit against the United States of America under the Comprehensive Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*, seeking to recover the costs that ARC allegedly has incurred in cleaning up certain environmental contamination at a facility in Camden, Arkansas. *See* Complaint ¶¶ 1, 2, filed December 12, 2002. ARC based its complaint on CERCLA Sections 107(a) (the cost recovery provision) and 113(f) (the contribution provision), 42 U.S.C. §§ 9607(a), 9613(f).

Recently, the parties informed the Court of the Supreme Court's decision in *Cooper Indus., Inc. v. Aviall*

Servs., Inc., 125 S. Ct. 577 (2004) ("*Aviall*"), *see* Joint Notice of Supreme Court Decision, filed December 21, 2004 ("Joint Notice"), in which the Supreme Court held that a party may not bring a contribution claim under Section 113(f)(1) in the absence of a preexisting civil action against that party to undertake or pay for the cleanup. After the *Aviall* decision, ARC sought to amend its complaint to drop its Section 113(f) claim (because there is and has been no such civil action against ARC to undertake or pay for the cleanup) and to clarify that CERCLA Section 107(a) is the sole basis for ARC's claim to recoup the costs it has incurred in cleaning up the contaminated property. *See* Motion for Leave to File Amended Complaint, filed December 23, 2004. On December 23, 2004, the Court granted ARC's motion to amend its complaint. *See* Order Permitting Filing of Amended Complaint, entered December 23, 2004.

ARC's amended complaint does not save ARC's lawsuit. Plaintiff's amendment is directly contrary to Eighth Circuit precedent, as well as the holdings of nine other courts of appeals, that Section 107(a) does not provide an independent statutory basis for ARC either to recover all of its costs under a cost recovery claim, or to recover some portion of its costs under a contribution claim. Thus, the Court should dismiss ARC's amended complaint for failure to state a claim upon which relief can be granted.

BACKGROUND

I. CERCLA BACKGROUND

Congress enacted CERCLA (also generally known as "Superfund") in 1980 in response to the serious environmental and health dangers posed by property contaminated by hazardous substances. *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA, as amended in 1986 by the Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-99, 100 Stat. 1613, "grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994). It "both provides a mechanism for cleaning up hazardous waste sites, and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989) (citations omitted).

CERCLA provides the President (acting primarily through the United States Environmental Protection Agency ("EPA")) with alternative means for cleaning up contaminated property. EPA itself can undertake response actions to address hazardous substances, *see* 42 U.S.C. § 9604, or EPA can compel responsible parties (through an administrative order or a request for judicial relief) to undertake response actions, which EPA then monitors, *see id.* § 9606. Under either approach, the United States may recover the costs associated with the response action ("response costs") through a cost recovery action under Section 107(a), *id.* § 9607(a).

CERCLA Section 107(a)(4)(A) authorizes the United States, as well as other entities and persons, to seek re-

covery of appropriate response costs through a "cost recovery" suit against four categories of "covered persons," referred to as "potentially responsible parties" or "PRPs." These four categories of PRPs are:

(1) owners and operators of facilities at which hazardous substances are located;

(2) past owners and operators of such facilities at the time hazardous substances were disposed of;

(3) persons who arranged for disposal or treatment of hazardous substances; and

(4) certain transporters of hazardous substances to the site.

Id. § 9607(a)(1)-(4).[1]

A PRP can escape liability for response costs only if it can establish that it qualifies for one of the enumerated defenses in Section 107(b), or some other narrowly defined exclusion from liability.[2] *Id.* § 9607(b). Section 107(b) specifies the defenses to liability and provides that a PRP will not be liable if it can establish that the release of hazardous substances

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[1] Congress has broadly defined the pertinent statutory terms used in section 107—including "facility," "hazardous substance," "owner or operator," "person," "release," "transport," and "disposal"—to reach a wide range of entities and activities. *See id.* § 9601(9), (14), (20)-(22), (26), (29).

[2] See, e.g., 42 U.S.C. §§ 9607(n) (liabilities of fiduciaries and certain exclusions), 9607(q) (contiguous properties), 9607(r) (bona fide prospective purchasers).

> [was] caused solely by—(1) an act of God; (2) an act of war; (3) an act or omission of a third party, other . . . than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes . . . that (a) he exercised due care with respect to the hazardous substance concerned . . . and (b) he took precautions against foreseeable acts or omissions of any such third party . . . .

Id.

Assuming that a PRP cannot avail itself of one of the enumerated defenses or exclusions to liability, Section 107(a) specifically provides that the United States, individual States, and Indian tribes are entitled to recover from PRPs "all costs of removal or remedial action incurred" that are "not inconsistent with the national contingency plan."[3] *Id.* § 9607(a)(4)(A). In addition, Section 107 provides that PRPs "shall be liable for [] any other necessary costs of response incurred by any other person consistent with the national contingency plan." *Id.* § 9607(a)(4)(B). Several courts of appeals have concluded that persons who are not themselves liable and, thus, not a PRP, may clean up contaminated property and then invoke this provision to seek reimbursement, *i.e.*, cost recovery, from the same four categories of

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[3] "The national contingency plan specifies procedures for preparing and responding to contaminations and was promulgated by the [EPA] pursuant to CERCLA § 105, 42 U.S.C. § 9605 (2000 ed. and Supp. I). The plan is codified at 40 C.F.R. pt. 300 (2004)." *Aviall*, 125 S. Ct. at 580, n.2.

PRPs that are subject to government cleanup actions.[4] Further, ten courts of appeals, including the Eighth Circuit, have uniformly concluded that a person who falls within one of those four categories and, thus, is itself a PRP, cannot rely on Section 107(a) to seek *full cost recovery* on a theory of joint and several liability from another jointly liable party; rather, a party that is itself a PRP is limited to seeking *contribution* from other jointly liable parties in pursuant to Section 113(f).[5]

Congress enacted Section 113(f) in 1986 as part of the SARA amendments to address specifically when a PRP may seek contribution from other PRPs. *See* 42 U.S.C. § 9613(f)(1). Section 113(f)(1) provides in pertinent part that "[a]ny person may seek contribution from

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[4] *See In re Reading Co.*, 115 F.3d 1111, 1120 (3d Cir. 1997); *Rumpke of Ind., Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1242-43 (7th Cir. 1997); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 100 (1st Cir. 1994); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

[5] *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 423-425 (2d Cir. 1998); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 776 (4th Cir. 1998); *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525, 530-531 (8th Cir. 2003); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1121-1123 (3d Cir. 1997) ("*Halliburton*"); *Redwing Carriers*, 94 F.3d at 1496; *United States v. Colorado & E. R.R.*, 50 F.3d 1530, 1534-1536 (10th Cir. 1995); *United Techs. Corp.*, 33 F.3d at 103; *Akzo*, 30 F.3d at 764. In addition, the Fifth Circuit, although it does not appear to have directly addressed this issue, also has recognized that "[w]hen one liable party sues another to recover its equitable share of the response costs, the action is one for contribution, which is specifically recognized under CERCLA." *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989).

any other person who is liable or potentially liable under [Section 107(a)], during or following any civil action under [Section 106] or under [Section 107(a)]." *Id.*[6]

As explained above, the Supreme Court determined in *Aviall* that party may not bring a contribution claim under Section 113(f)(1) in the absence of a preexisting civil action against that party to undertake or pay for the cleanup. 125 S. Ct. at 580; see *supra* at 1. The central issue in this case is whether ARC—who, after *Aviall*, cannot sue for contribution under 113(f)(1)—instead can rely solely on CERCLA section 107(a) to bring either a cost recovery or contribution action against the United States when ARC is itself a PRP who does not qualify for one of the enumerated defenses in section 107(b) or for any other exclusion to liability.

II. FACTUAL BACKGROUND

From approximately 1979 until October 2003, ARC leased property in the Highland Industrial Park in Camden, Arkansas ("Camden Site" or "the Site"). From July

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[6] In addition, CERCLA Section 113(f)(3)(B) provides an express right of contribution for:

> [a] person who has resolved its liability to the United States for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in [Section 113(f)(2)].

42 U.S.C. § 9613(f)(3)(B). The Supreme Court in *Aviall* explained the difference between Sections 113(f)(1) and (f)(3)(B), stating that under section 113(f)(1) "contribution may only be sought subject to the specified conditions, namely, 'during or following' a specified civil action." 125 S. Ct. at 583. Section 113(f)(3)(B), however, "permits contribution actions after settlement . . . ." *Id.*

31, 1981 until 1986, ARC (under contract with the United States) retrofitted over 3,200 rocket motors by removing propellant that contained ammonium perchlorate ("AP") and substituting a different propellant in the motor. *See* Amended Complaint *Id.* ¶¶ 7, 14, entered December 23, 2004 ("Am. Compl."). To accomplish this retrofitting, ARC decided to construct a building at the Camden Site known as Building 52 in which ARC installed and used a high pressure water spray system to remove the AP-based propellant from the rocket motors. *Id.* ¶¶ 19, 20. Through this process, wastewater contaminated with the AP-based propellant was released into the environment, thereby contaminating soil and groundwater at the Camden Site. *Id.* ¶¶ 21-24, 30. In addition, ARC received a permit from the State of Arkansas to burn pieces of the AP-based propellant and the AP-contaminated wastewater in an open burning unit at the Camden Site. *Id.* ¶¶ 25-26. Portions of the AP-based propellant pieces and the contaminated wastewater were released into the environment from the open burning unit, further contaminating soil and groundwater at the Site. *Id.* ¶¶ 28-29, 30. ARC subsequently performed "investigations and response actions" at the Camden Site to address this contamination and alleges to have incurred response costs related to those actions. *Id.* ¶ 65.

ARC originally filed this lawsuit on December 12, 2002, under CERCLA sections 107(a) and 113(f), 42 U.S.C. §§ 9607(a), 9613(f), seeking to recover the response costs that it allegedly has incurred at the Camden Site. *See* Complaint ¶¶ 1, 2, 7, filed December 12, 2002. For over two years, the parties engaged in settlement negotiations to resolve the United States' fair share of alleged liability for these costs. *See* Joint Mo-

tion for Stay of Proceedings, filed December 9, 2003; Joint Status Report, Motion to Govern, and Request for Telephonic Status Hearing, filed November 17, 2004 ("November 2004 Status Report"). Toward the end of 2004 these negotiations ended when the Supreme Court issued its decision in *Aviall*. 125 S. Ct. 577. In *Aviall*, the Supreme Court conclusively determined that a party who is liable under CERCLA (a PRP), but who has not been sued under CERCLA to undertake or pay for the cost of cleanup, cannot seek contribution under CERCLA section 113(f)(1), 42 U.S.C. § 9613(f)(1). *Aviall*, 125 S. Ct. at 580.

After the *Aviall* decision, ARC, as a matter of law, has no claim against the United States under Section 113(f) because: (1) ARC has not been sued under CERCLA to undertake or pay for the cost of cleanup and therefore a suit under Section 113(f)(1) is not authorized, and (2) ARC has not resolved its liability to the United States or a State for any of ARC's alleged response costs and therefore a suit under Section 113(f)(3)(B) also is not authorized. *See* Joint Notice at 2. ARC accordingly sought to amend its complaint, among other reasons, to drop its section 113(f) claim in light of *Aviall* and plead a section 107(a) claim as the sole basis for recovery. *See* Motion for Leave to File Amended Complaint, filed December 23, 2004. On December 23, 2004, the Court granted ARC's request and entered the Amended Complaint.

STANDARD OF REVIEW

In deciding a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), "a court must accept the complaint's factual allegations as true and con-

strue them in the light most favorable to the plaintiff." *Bohan v. Honeywell Int'l, Inc.*, 366 F.3d 606, 608 (8th Cir. 2004). The complaint must be dismissed if plaintiff "cannot prove any set of facts that would entitle [it] to relief." *Id.*

ARGUMENT

I. ARC IS A PRP AND CANNOT AVAIL ITSELF OF ANY OF THE ENUMERATED DEFENSES UNDER CERCLA

Before discussing why ARC cannot maintain an independent cause of action under CERCLA Section 107(a), we must first establish that ARC indeed is a PRP. At a minimum, ARC is liable as a past operator under CERCLA Section 107(a)(2), because at the time of disposal, ARC operated the Camden Site, and particularly Building 52 and the open burning unit. *See* 42 U.S.C. § 9607(a)(2); *see also supra* at 6 (citing Am. Compl. ¶¶ 19-30).[7]

The Supreme Court established the standard for operator liability in *Bestfoods*: "[A]n operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decision about compliance with environmental regulations." 524 U.S. at 66-67. ARC does not and cannot dispute that it meets this test. ARC's Amended Complaint states that ARC was responsible for: (1) removing the hazardous substance (AP-based propellant) from the rocket motors by developing, installing, and using a high pressure water

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[7] By making the argument here that ARC is a past operator, the United States is not waiving any argument that ARC also is liable as an arranger and a transporter. *See* 42 U.S.C. §§ 9607(a)(3), (4).

spray system in Building 52, Am. Compl. ¶¶ 18-20; (2) conducting the operations at the Site that led to propellant-contaminated wastewater and pieces of propellant being disposed into drainage systems, soil and groundwater, and the open burn unit, *id.* ¶¶ 21-25, 28-30; and (3) obtaining a permit from the State of Arkansas to burn contaminated propellant pieces in the open burn unit which resulted in disposal of AP contaminants into the environment, *id.* ¶¶ 26, 28-30. Through these actions, ARC is liable as an operator at the Camden Site under Section 107(a)(2), 42 U.S.C. § 9607(a)(2).

The only way that ARC can escape liability under CERCLA is to establish that it falls under one of the enumerated defenses in Section 107(b), *see supra* at 3-4, or certain other narrowly defined exclusions to liability that are inapplicable in this case. *See supra* n.2. Only if one of these provisions applies can ARC be deemed "innocent" and therefore be able to maintain an independent Section 107 action against another PRP. *Dico*, 340 F.3d at 531 ("an action between an innocent party and another PRP is not between two liable parties"); *see infra* at 12-13. ARC has not alleged a single fact in its Amended Complaint to establish that any of these defenses is applicable. ARC therefore is liable as a PRP and, thus, as discussed below, cannot maintain an independent cause of action under CERCLA Section 107(a) against another PRP.[8]

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[8] The United States is not waiving any of its defenses to liability, including whether the United States is a PRP. For purposes of this motion only, however, the United States will assume its status as a PRP against whom ARC is seeking either full cost recovery or contribution under Section 107(a).

II. AS A PRP, ARC'S INDEPENDENT CLAIM UNDER CERCLA SECTION 107(a) FOR EITHER FULL COST RECOVERY OR IMPLIED CONTRIBUTION IS CONTRARY TO LAW

ARC's Amended Complaint states only that ARC brings this suit under CERCLA section 107(a). Am. Compl. ¶ 1 and Prayer for Relief. The Amended Complaint does not state whether ARC is seeking full cost recovery or contribution under Section 107. Regardless, however, ARC's Amended Complaint should be dismissed because the Eighth Circuit, as well as nine other courts of appeals, have determined that a party who itself is a PRP under CERCLA cannot maintain an independent claim under CERCLA section 107(a); instead, that party is limited to seeking contribution from other liable parties pursuant to CERCLA section 113(f) (which ARC cannot do as discussed *supra* at 7). *See Dico*, 340 F.3d at 530-31 ("[T]here is overwhelming authority among the circuits to support the . . . argument that PRPs are limited to actions for contribution. Accordingly, we hold Dico may not bring an action against the Customer Group for direct recovery unless it can establish it falls within one of the enumerated defenses set out in § 107(b)"); *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 935 (8th Cir. 1995) ("Allocation is a contribution claim controlled by 42 U.S.C. § 9613(f)."). [9] The history of the relationship between

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[9] The other relevant courts of appeals cases are: *Bedford Affiliates*, 156 F.3d at 424 ("The language of CERCLA suggests Congress planned that an innocent party be able to sue for full recovery of its costs, *i.e.*, indemnity under § 107(a), while a party that is itself liable may recover only those costs exceeding its *pro rata* share of the entire cleanup expenditure, *i.e.*, contribution under § 113(f)(1)"); *Centerior*

CERCLA Sections 107(a) and 113(f) is helpful to understanding why the Eighth Circuit and other courts of appeals have reached this conclusion.

"CERCLA and SARA together create two different kinds of legal actions by which parties can recoup some or all of the costs associated with clean-ups: section 107 cost recovery actions, . . . and section 113 contribution actions." *Halliburton*, 111 F.3d at 1120; *see Browning-Ferris Indus.*, 33 F.3d at 98; *Colorado & E. R.R.*, 50 F.3d at 1535. The two remedies overlap to some extent because they both allow private parties to recoup costs

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Serv., 153 F.3d at 350 ("Claims by PRPs . . . seeking costs from other PRP's are necessarily actions for contribution, and are therefore governed by the mechanisms set forth in § 113(f)"); *Pneumo Abex*, 142 F.3d at 776 ("[S]ection [113] must be used by parties who are themselves potentially responsible parties"); *Pinal Creek*, 118 F.3d at 1302 ("Under CERCLA's scheme, section 107 governs liability, while section 113(f) creates a mechanism for apportioning that liability among responsible parties"); *Halliburton*, 111 F.3d at 1120 ("An action brought by a potentially responsible person is by necessity a section 113 action for contribution"); *Redwing Carriers*, 94 F.3d at 1513 ("[W]hen one liable party sues another liable party under CERCLA, the action is not a cost recovery action under § 107(a). Rather, it is a claim for contribution under § 113(f)"); *Colorado & E. R.R.*, 50 F.3d at 1536 ("whatever label Farmland may wish to use, its claim remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make . . . controlled by § 113(f)"); *Browning-Ferris Indus.*, 33 F.3d at 103 ("[A]n action by a responsible party to recover from another responsible party that portion of its costs that are in excess of its *pro rata* share of the aggregate response costs . . . clearly qualifies as an action for contribution under section 9613(f)(1)"); *Akzo*, 30 F.3d at 764 ("Whatever label Akzo may wish to use, its claim remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make. Akzo's suit accordingly is governed by section 113(f)").

from other private parties in certain situations. *Aviall*, 125 S. Ct. at 582 n.3. Despite this slight overlap, however, "the two remedies are clearly distinct." *Id.*

"The original CERCLA legislation enacted in 1980 created the cost recovery scheme under § 107(a)." *Bedford Affiliates*, 156 F.3d at 423. Under this scheme, PRPs generally are jointly and severally liable for appropriate response costs, which can result in one PRP bearing a disproportionate share of the response costs. *Dico*, 340 F.3d at 529-530. The original CERCLA statute did not contain any specific mechanism that would allow one PRP to seek contribution from other PRPs to avoid such a disproportionate result. *Id.* at 530. Thus, after CERCLA's passage, litigation arose over whether a PRP who had been sued in a cost recovery action (by the government or by another entity) could obtain contribution from other PRPs to avoid paying a disproportionate share of the response costs. As a result, numerous district courts found that despite the absence of an express contribution provision in CERCLA, the right to contribution either could be implied from the statute or could arise as a matter of federal common law. *See Aviall*, 125 S. Ct. at 581 (citing *United States v. New Castle County*, 642 F. Supp. 1258, 1263-1269 (D. Del. 1986) (contribution right arises under federal common law); *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1486-1493 (D. Colo. 1985) (same); *Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985) (contribution right is implied from § 107(e)(2))).[10]

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[10] The Supreme Court in *Aviall* noted that these district court decisions were "debatable in light of two decisions of this Court that refused to recognize implied or common-law rights to contribution in other federal statues." 125 S. Ct. at 581 (citing *Texas Industries, Inc.*

This "judicially-created expansion of § 107(a)(4)(B) served as the sole means by which parties could obtain contribution" until Congress enacted Section 113(f)(1) as part of the 1986 SARA amendments. *Reading*, 115 F.3d at 1119.

The 1986 SARA amendments enacted Section 113(f)(1), which provided for express right of contribution between PRPs. *Dico*, 340 F.3d at 530. Since that time, every court of appeals addressing the issue of contribution between PRPs has concluded that "the express language [in Section 113(f)] providing for a right of contribution implied an intent to limit PRPs to claims for contribution, and to preclude actions between PRPs for direct recovery." *Dico*, 340 F.3d at 530 (citing *N.J. Turnpike Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 104 (3d Cir. 1999); *Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 191 F.3d 409, 415 (4th Cir. 1999); *Bedford Affiliates*, 156 F.3d at 424; *Centerior Serv.*, 153 F.3d at 350; *Pinal Creek*, 118 F.3d at 1306; *Redwing Carriers*, 94 F.3d at 1496; *Colorado & E. R.R.*, 50 F.3d at 1536; *Browning-Ferris*, 33 F.3d at 101; *Akzo*, 30 F.3d at 764; *Amoco Oil*, 889 F.2d at 672). "Thus, the language of § 113(f), permitting contribution, *replaced* the judicially created right to contribution under § 107(a)(4)(B)," *Reading*, 115 F.3d at 1119 (emphasis added), and became "the *sole* means for seeking contribution." *Id.* at 1120 (emphasis added); *see Halliburton*, 111 F.3d at 1120-22.

The Eighth Circuit in *Dico* specifically addressed the issue of actions between PRPs and unequivocally rejected the argument that CERCLA allows direct cost

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v. Radcliff Materials, Inc., 451 U.S. 630, 638-647 (1981); *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 90-99 (1981)).

recovery actions between PRPs under Section 107. The Eighth Circuit stated that CERCLA Section 107 "allows the government or an '*innocent*' private party to recover cleanup costs from PRPs through a direct cost recovery action." 340 F.3d at 529 (emphasis added) (citing 42 U.S.C. § 9607(a)). The court then went on to explain that since the 1986 SARA amendments, the "overwhelming authority among the circuits" has held that "PRPs are limited to actions for contribution." *Id.* at 531; *see id.* at 530 (citing cases from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits). The Eight Circuit agreed with this "overwhelming authority" and held that a PRP "may not bring an action against [another PRP] for direct recovery unless it can establish it falls within one of the enumerated defenses set out in § 107(b)." *Id.* at 531. Accordingly, the law in this Circuit is that a PRP—like ARC—cannot rely solely on Section 107(a) to recoup its response costs and instead is limited to bringing a contribution action under Section 113(f), unless the PRP can establish that it is not liable because it can avail itself of one of the enumerated defenses in Section 107(b).

The uniformity among the courts of appeals on this issue is not surprising. These decisions rest on the principle recognized in a variety of judicial and statutory contexts that jointly responsible parties may obtain an equitable allocation of their common liability through the mechanism of a contribution claim. *See e.g.*, *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 87-88 (1981). In addition, these decisions give CERCLA the full effect that Congress intended. CERCLA's language strongly suggests that "Congress planned that an innocent party be able to sue for full recovery of its costs, *i.e.*, indemnity under § 107(a), while a party that

is itself liable may recover only those costs exceeding its *pro rata* share of the entire cleanup expenditure, *i.e.*, contribution under § 113(f)(1)." *Bedford Affiliates*, 156 F.3d at 424. Thus, to the extent that ARC seeks full cost recovery against the United States under a theory of joint and several liability under Section 107(a), such a claim has been uniformly rejected by ten courts of appeals, including the Eighth Circuit, and also should be rejected here.

Not only is ARC barred from asserting any claim for full cost recovery under Section 107(a) in this case, but it also is barred from asserting an implied contribution claim under that Section. *Every* courts of appeals addressing the issue has found that the only mechanisms under CERCLA for pursuing a contribution claim are provided in Section 113(f). *See supra* at 10, n.9. "CERCLA and SARA together create two different kinds of legal actions by which parties can recoup some or all of the costs associated with clean-ups: section 107 cost recovery actions, [] and section 113 contribution actions." *Halliburton*, 111 F.3d at 1120 (internal citations omitted); *Browning-Ferris*, 33 F.3d at 99-101 (same). Accordingly, a claim for contribution cannot be asserted *independently* under CERCLA Section 107(a)(4)(B); there must be a claim asserted under CERCLA Section 113(f)(1) or (f)(3)(B). *See Pinal Creek*, 118 F.3d at 1306 (a PRP's claim for contribution "*requires* the application of § 113 [because] a PRP is limited to a contribution claim governed by the joint operation of §§ 107 and 113") (emphasis added).

Further, although the Supreme Court in *Aviall* did not reach the issue of an implied right of contribution under Section 107, the Court specifically noted that

"[t]o the extent that Aviall chooses to frame its § 107 claim on remand as an implied right of contribution (as opposed to a right of cost recovery), . . . we note that this Court has visited the subject of implied rights of contribution before." 125 S. Ct. at 586 (citing *Texas Indus.*, 451 U.S. at 638-647; *Northwest Airlines*, 451 U.S. at 90-99). In both of the cases that the Supreme Court cited—*Texas Indus.* and *Northwest Airlines*—the Supreme Court determined that the statutes in question did not create an express right to contribution. *Texas Indus.*, 451 U.S. at 640; *Northwest Airlines*, 451 U.S. at 90-91. Therefore if any right to contribution existed under either statute, it had to exist through federal common law. *Texas Indus.*, 451 U.S. at 639; *Northwest Airlines*, 451 U.S. at 90-91. In both cases, however, the Supreme Court declined to find that federal common law had created an implied right of contribution under the statutes in question. *Texas Indus.*, 451 U.S. at 646 ("We are satisfied that neither the Sherman Act nor the Clayton Act confers on federal courts the broad power to formulate the right to contribution here."); *Northwest Airlines*, 451 U.S. at 91, 94-95 ("[W]e have been unable to discover any manifestation of an intent on the part of Congress to create a right to contribution in favor of employers under the Equal Pay Act and Title VII. Accordingly we hold that there is no implied right to contribution under those statutes").

Aside from the Supreme Court's admonition in *Aviall* regarding an implied right of contribution under Section 107, the Supreme Court's principles of statutory construction also compel the conclusion that CERCLA Section 107(a)(4)(B) cannot serve as an independent basis for a contribution claim. "It is an elemental canon of statutory construction that where a statute expressly

provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979); *accord Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 488 (1996). "[O]nce Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Therefore, the task of the federal courts is to interpret and apply statutory law, not to create common law." *Northwest Airlines*, 451 U.S. at 95 n.34. The Supreme Court has "explained [that] where Congress has provided 'elaborate enforcement provisions' for remedying the violation of a federal statute, as Congress has done with . . . CERCLA, 'it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under' the statute." *Meghrig*, 516 U.S. at 487-488 (citing *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981)). Thus, because Congress expressly authorized private citizens to bring contribution actions when it enacted section 113(f), it would be inappropriate to read an independent right of action of contribution into section 107(a)(4)(B). Accordingly, ARC's attempt in its Amended Complaint to plead a cause of action under CERCLA Section 107(a) for contribution—without reference to the express causes of action provided in Section 113(f)—is futile.

Because ARC is a liable as a PRP and cannot avail itself of any of the enumerated defenses or exclusions under Section 107(b), ARC's attempt to invoke Section 107(a) as the sole basis for recouping all or some of its alleged response costs is directly contrary to Eighth Circuit precedent. The Court therefore should dismiss ARC's Amended Complaint.

CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court grant the Motion to Dismiss for Failure to State a Claim on the grounds that CERCLA section 107(a), 42 U.S.C. § 9607(a), does not provide ARC with an independent cause of action in this case.

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

Case No. 02-CV-1199

ATLANTIC RESEARCH CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Mar. 8, 2005]

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Defendant, the United States of America, moved to dismiss the amended complaint of Plaintiff, Atlantic Research Corporation ("ARC"), that asserts a stand-alone claim under Section 107(a) of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a), to recover cleanup costs ARC allegedly incurred at a hazardous waste site. Section 107(a) does not provide a potentially responsible party ("PRP") like ARC with a right to sue another liable party to recover either all or some of those cleanup costs. Eighth Circuit precedent, as well as nine other courts of appeals, dictates that such suits are by their very nature suits in contribution that can be brought *only* pursuant to CERCLA Section 113(f), 42 U.S.C. § 9613(f). ARC's arguments to the contrary reflect fun-

damental misunderstandings of this body of caselaw, as well as a significant misreading of the Supreme Court's decision in *Cooper Indus., Inc. v. Aviall Services, Inc.*, 125 S.Ct. 577 (2004) ("*Aviall*"). The Court therefore should grant the United States' motion.

I. *AVIALL* DOES NOT OVERRULE OR CAST DOUBT ON EIGHTH CIRCUIT AND OTHER APPELLATE CASELAW THAT A LIABLE PRIVATE PARTY CANNOT SUE SOLELY UNDER SECTION 107(a)

District courts in the Eighth Circuit, as well as the Eighth Circuit itself, are bound "to apply the precedent of this Circuit." *Hood v. United States*, 342 F.3d 861, 864 (8th Cir. 2003) (citation omitted). Eighth Circuit decisions remain good law "[u]ntil modified or overruled by the court en banc." *Gipson v. KAS Snacktime Co.*, 171 F.3d 574, 576 n.3 (8th Cir. 1999).

The Eighth Circuit's decision in *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525 (8th Cir. 2003), governs this case. In *Dico*, the court held that an action by a private PRP against another PRP is necessarily one for contribution that is governed by the express right of contribution in CERCLA Section 113(f). *Id.* at 530-531. Because that precedent has been neither overruled nor cast into doubt by *Aviall* or by an en banc panel of the Eighth Circuit, this Court is bound by it.

ARC is incorrect that the Supreme Court's holding and underlying rationale in *Aviall* creates a new legal landscape under which "volunteer PRPs" can bring a stand-alone claim under Section 107(a).[1] Plaintiff's

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[1] ARC repeatedly makes a distinction between private PRPs who voluntarily conduct a CERCLA cleanup and PRPs who are compelled by the government to do so. Plf's Opp. at 2, 15-16. For purposes of

Memorandum in Opposition to Defendant's Motion to Dismiss for Failure to State a Claim, filed February 17, 2005 ("Plf's Opp.") at 2. The sole issue and holding in *Aviall* was "whether a private party who has not been sued under [CERCLA] § 106 or § 107(a) may nevertheless obtain contribution under § 113(f)(1) from other liable parties. We hold that it may not." 125 S. Ct. at 580. Nothing in *Aviall* overrules, let alone calls into question, the rule in the Eighth Circuit or nine other circuits that the sole mechanism for private PRPs to recover alleged response costs they have incurred is provided in Section 113(f).

The Supreme Court explicitly refused to address whether a private PRP (like ARC) has an independent right under Section 107(a) to seek cost recovery—either in whole or in part through contribution—from other PRPs. *Aviall*, 125 S. Ct. at 585 ("withhold[ing] judgment" on whether a liable party may seek cost recovery under Section 107); *id.* at 586 ("we decline to decide whether Aviall has an implied right to contribution under § 107"). Given this express refusal, one district court has already determined that *Aviall* did not overrule the Second Circuit's ruling in *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998), which held that a private PRP is limited to seeking *contribution* from other liable parties under Section 113(f). In *Elementis Chems., Inc. v. TH Agriculture & Nutrition, L.L.C.*, No. 03 Civ. 5150 (LBS), 2005 WL 236488 (S.D.N.Y. Jan. 31,

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distinguishing a claim under Section 107(a)(4)(B) from one under Section 113(f), the relevant distinction is not between volunteers or non-volunteers; rather, it is between liable or non-liable parties. *See, e.g., Dico*, 340 F.3d at 529-530 (distinguishing Section 107(a) claims which are for the government or an "innocent" private party from Section 113(f) claims which are claims by one PRP against another).

2005), the district court concluded that "[i]t would be inappropriate . . . to contradict the Supreme Court and declare that the Supreme Court had effectively done something which it specifically said it had not done—namely, overrule[] *Bedford Affiliates*." *Id.* at *10.

In addition, *Aviall* does not cast any doubt on the well-established principles underlying *Dico* and the other courts of appeals decisions.[2] ARC urges that *Aviall* "fundamentally altered the assumptions underlying the referenced decisions of the ten courts of appeals . . . ." Plf's Opp. at 16. The critical flaw in ARC's argument, however, is that it rests on the assumption that the courts of appeals disallowed actions by private PRPs under Section 107(a) *only* because they assumed that *all* private PRPs, volunteer or not, could use 113(f) to seek contribution. *Id.* at 2, 16-17, 20-21. But this same argument was rejected by the court in *Elementis*. *See* 2005 WL 236488, at *10 (rejecting plaintiff's argument that "'the essential underlying premise[]'" of *Bedford Affiliates* was "'that all PRPs, including those who had not been subject to a prior 106 or 107(a) action . . . can proceed with a contribution action under section 113(f)'"). Although *Aviall* may have changed a "volunteer" PRP's ability to seek contribution under Section 113(f)(1), it did nothing to change the fundamental assumption that underlies the courts of appeals cases: that claims by private PRPs, *i.e.*, liable parties, are *necessarily* actions for contribution, which *must* be brought using the ex-

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[2] *See* Defendant's Memorandum in Support of Motion to Dismiss for Failure to State a Claim, filed January 26, 2005 ("Def's Mem.") at 4 n.5 (citing cases that have restricted private PRPs to actions for contribution under Section 113(f)).

press limited mechanisms that Congress provided in Section 113(f).[3]

Although courts of appeals decisions have rightly considered the interplay between Sections 107(a) and 113(f), they did so by looking to the "venerable common-law backdrop," *United States v. Bestfoods*, 524 U.S. 51, 62 (1998), against which Congress enacted Section 113(f). Congress' language in Section 113(f) reflects the general understanding, firmly rooted at the time of the Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613, that "[t]he term 'contribution' is a standard legal term that refers to a claim 'by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make." *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1121 (3d Cir. 1997) ("*Halliburton*") (quoting *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 99 (1st Cir. 1994)); *see Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 350-351 (6th Cir. 1998) (looking to traditional concept of contribution); *United States v. Colorado & Eastern R.R.*, 50 F.3d 1530, 1536 (10th Cir. 1995) (citing Restatement (Second) of Torts § 886A (1979)). The two express avenues for contribution that Congress provided in Sections 113(f)(1) and (f)(3)(B) are consistent with that traditional understanding of contribution. Against that common law backdrop, the courts of appeals concluded that suits by private PRPs under

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[3] Section 113(f)(1) is not CERCLA's only avenue of recourse for a private PRP. Section 113(f)(3)(B) allows a PRP who has entered a settlement to sue for contribution. 42 U.S.C. § 9613(f)(3)(B). A private PRP also may have a right under appropriate circumstances to seek recovery from other PRPs under state law.

CERCLA are "quintessential claim[s] for contribution," *Bedford Affiliates*, 156 F.3d at 424 (citing other circuit court decisions and Restatement (Second) of Torts § 886A (1979)), and therefore that such parties are restricted to pursuing one of the express avenues for contribution in Section 113(f). *See* Def's Mem. at 4 n.5 (citing cases); *id.* at 9-10 & n.9 (citing cases).[4]

For example, in *United Techs.*, 33 F.3d 96 (1st Cir. 1994), the issue before the First Circuit was whether the action was one for cost recovery or for contribution, which was determinative of which statute of limitations applied. *Id.* at 98. The court focused on the "stable, well-known denotation" of the legal term "contribution." *Id.* at 99.

> Adapted to an environmental case, [contribution] refers to an action by a *responsible* party to recover from another responsible party that portion of its costs that are in excess of its *pro rata* share of the aggregate response costs (including both first-instance costs and reimbursed costs).

Id. at 103 (emphasis added). Because the claimants were indeed liable, "their claim[s] [against another PRP] must be classified as an action for contribution." *Id.* at 101. Nothing in *Aviall* either expressly or implicitly altered this fundamental understanding.

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[4] Because this traditional understanding of contribution was the basis for the appellate decisions, including *Dico*, the fact that *Dico* involved a PRP who was issued an administrative order under CERCLA section 106 is of no consequence, despite ARC's musings to the contrary. *See* Plf's Opp. at 18-20. The private PRP in *Dico* was limited to an action for contribution because it was *liable*, not because it had been received an administrative order. 340 F.3d at 530-531.

II. SECTION 107(a)(4)(B) DOES NOT EXPRESSLY OR IMPLIEDLY PROVIDE AN INDEPENDENT CAUSE OF ACTION FOR A PRIVATE PRP WHO DOES NOT SATISFY THE CONDITIONS IN SECTION 113(f)

Although *Aviall* has not changed the legal landscape that precludes a private PRP (volunteer or otherwise) from using Section 107(a) to assert a stand-alone claim against another PRP, ARC urges the Court to find that Section 107(a)(4)(B) *expressly* authorizes such a claim. Plf's Opp. at 9-14. This argument flies in the face of the appellate courts decisions and is unsupported by the text and structure of CERCLA.

The Eighth Circuit in *Dico* found that Section 107 "allows the government or an '*innocent*' private party to recover cleanup costs from PRPs through a *direct* cost recovery action." 340 F.3d at 529 (emphasis added).[5] Under a Section 107 action, "PRPs are held jointly and severally liable for the costs of cleanup." *Id.* at 529-530.[6] As a result, one PRP "may bear a disproportionate share of the cleanup costs." *Id.* at 530. In light of that possible inequity, some pre-SARA courts *implied* a right to contribution under Section 107. *Id.* (citations omitted).[7] But in 1986, Congress codified an *express*

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[5] *See also Halliburton*, 111 F.3d at 1120 ("a section 107 action brought for recovery of costs may be brought only by *innocent* parties that have undertaken clean-ups") (emphasis in original).

[6] *See Halliburton*, 111 F.3d at 1121 (a section 107 action imposes joint and several liability).

[7] The Supreme Court majority observed that these pre-SARA holdings were "debatable in light of two decisions of this Court that refused to recognize implied or common-law rights to contribution in other federal statutes." 125 S. Ct. at 581 (citations omitted); *id.* at 586 (the Supreme Court "visited the subject of implied rights of contribu-

mechanism for seeking contribution through the two avenues in Sections 113(f)(1) and (f)(3)(B). After that, courts consistently "held the express language" of Section 113(f) "limit[s] PRP's to claims for contribution, and . . . preclude[s] actions between PRPs for *direct* recovery." *Id.* at 530 (citations omitted) (emphasis added). Based on this understanding, the Eighth Circuit in *Dico* specifically rejected the argument that "the *direct* recovery action found in § 107 is available . . . equally" to non-liable private parties and liable private parties (PRPs). *Id.* at 530-531. Thus, in the Eighth Circuit, private PRPs—like ARC—may *not* bring an independent action against other PRPs for recovery under Section 107(a). *Id.* at 531. This result is consistent with the traditional contribution concepts discussed *supra* at 3-4.

Contrary to this precedent, ARC argues that Section 107(a)(4)(B) provides an express right to contribution independent of Section 113 and regardless of whether a PRP meets the prerequisites of Section 113(f). Plf's Opp. at 10-15. Relying on language in Section 107(a)(4)(B) that provides, in relevant part, that the four categories of PRPs "shall be liable" for "any other necessary costs of response incurred by *any other person* consistent with the national contingency plan," 42 U.S.C. § 9607(a)(4)(B) (emphasis added), ARC claims that this language creates a catchall that allows *any* private person, regardless of its liability and regardless of whether it meets the prerequisites of Section 113(f) (like a "vol-

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tion before") (citations omitted); *see also United Tech.*, 33 F.3d at 100 (noting that the pre-SARA courts' recognition of an implied right of contribution under Section 107(a) "was clouded by the [Supreme] Court's refusal to imply rights of action under other statutes in the absence of an express direction from Congress") (citations omitted).

unteer" PRP) to seek contribution from another PRP. Several courts have rejected such an argument.

For example, the First Circuit in *United Techs.* rejected an argument that this language "provides an alternative avenue for maintenance of [a private PRP's] suit." 33 F.3d at 101. "At face value, this expansive reading of section 9607 is untenable[,]" and the First Circuit "refuse[d] to follow a course that ineluctably produces judicial nullification of an entire SARA subsection" in Section 113. *Id.* (citation omitted). Similarly, ARC's interpretation, would render Sections 113(f)(1) and (f)(3)(B) superfluous, ignoring Congress' intent that these two Sections preempt any implied right to contribution under Section 107(a) and provide *the* express limited mechanisms under which a PRP can seek contribution under CERCLA. *See In the Matter of Reading*, 115 F.3d 1111, 1119 (3d Cir. 1997) ("Congress intended to replace 107(a)(4)(B)'s implied contribution remedy when it enacted § 113(f)"). The Supreme Court has cautioned against such a result. *See Hohn v. United States*, 524 U.S. 236, 249 (1998) ("We are reluctant to adopt a construction making another statutory provision superfluous"). Other courts also have rejected arguments that the "any other person" language is broad enough to allow a PRP to bring a contribution action against other PRPs.[8]

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[8] *See Bedford Affiliates*, 156 F.3d at 424 (noting that Section 107(a) holds a PRP liable for costs incurred by "any other person," but concluding that an action by one PRP against another PRP is a "quintessential claim for contribution" that is governed by Section 113(f)); *Centerior Serv.*, 153 F.3d at 349-350 (rejecting argument that the "any other person" language does not limit Section 107(a) to "innocent" parties); *Halliburton*, 111 F.3d at 1122 (despite the "any . . . person" language, Section 107(a) "was designed to enable *innocent* persons who

In addition, ARC's expansive reading of Section 107(a) does not comport with CERCLA's plain language and structure. Congressional enactments should be construed in light of "the cardinal rule that a statute is to be read as a whole." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). The plain language of Sections 107(a) and 113(f) mesh with CERCLA's liability scheme and create a coherent mechanism for apportioning cleanup costs among jointly liable parties. Although Section 107(a)(4)(B) establishes the liability for "necessary costs of response" incurred by parties that cannot sue under Section 107(a)(4)(A), it "does not specify whether these costs will arise from joint and several liability or sound in contribution." *Centerior Serv.*, 153 F.3d at 350. Section 113(f) therefore provides the express mechanism for contribution. "In short, after SARA, CERCLA provided for a right to cost recovery in certain circumstances, § 107(a), and separate rights to contribution in other circumstances, §§ 113(f)(1), 113(f)(3)(B)." *Aviall*, 125 S. Ct. at 582. Since that time, Sections 107 and 113 have been read to work "[t]ogether . . . [to] provide and regulate a PRP's right to claim contribution from other PRPs." *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997). Parties seeking contribution under Section 113(f) look to Section 107 for the "basis and elements of the liability of the defendants" and, thus, the Section 113(f) action "*is* an action to recover the necessary costs of response by any other person, as referred to in § 107. The action only happens to be one for contribution." *Centerior*, 153 F.3d at 350 (em-

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incur expenses cleaning up a site to recover their costs from [PRPs]") (emphasis added).

phasis added) (agreeing with the government's argument to this effect).[9]

Contrary to ARC's view, Plf's Opp. at 26-31, this reading is the only result that avoids private PRPs making an end run around the statute of limitations in Section 113(g), 42 U.S.C. § 9613(g), or nullifying any part of that Section.[10] This also avoids the anomaly of one jointly liable private party suing another jointly liable party for the full costs of a CERCLA cleanup under Section 107(a). Finally, this ensures that parties who have settled with the government and received protection from "claims for contribution regarding matters addressed in the settlement," 42 U.S.C. § 9613(f)(2), are not subject to double liability through a Section 107(a) suit by a non-settling party on the theory that such a suit imposes an independent basis of liability apart from contribution.

Despite the plain language of CERCLA, ARC makes numerous other arguments in support of its expansive reading of Section 107(a), all of which are unpersuasive.[11] First, ARC's reliance on dicta in *Key Tronic*

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[9] *See also Centerior Serv.*, 153 F.3d at 353 ("any person may seek to recover costs under § 107(a), but . . . it is the nature of the action which determines whether the action will be governed exclusively by § 107(a) or by § 113(f) as well") (citations omitted); *Pinal Creek*, 118 F.3d at 1302 ("The contours and mechanics of this right [to contribution] are now governed by § 113").

[10] *See, e.g., Matter of Reading Co.*, 115 F.3d at 1119; *United Techs.*, 33 F.3d at 101; *Bedford Affiliates*, 156 F.3d at 424; *Pinal Creek*, 118 F.3d at 1304.

[11] One of ARC's remaining arguments concerns the statute of limitations in Section 113(g), 42 U.S.C. § 9613(g). Plf's Opp. at 24-26. ARC's argument that the CERCLA statute of limitations provisions "do not . . . conflict" with ARC's assertion of a stand-alone Section

Corp. v. United States, 511 U.S. 809 (1994), is misplaced. Plf's Opp. at 28; *see also* Plf's Opp. at 12-13 (citing *Key Tronic*, 511 U.S. at 816). The issue of the relationship between §§ 107 and 113 was *not* before the Supreme Court in that case. *Aviall*, 125 S. Ct. at 585 (*Key Tronic* "did not address the relevance, if any, of Key Tronic's status as a PRP or confront the relationship between §§ 107 and 113"); *see also Dico*, 340 F.3d at 531 (rejecting Dico's argument on the relevance of *Key Tronic* on the relationship between Sections 107 and 113). Thus, contrary to ARC's assertion, *Key Tronic* does not "underscore" that a "volunteer" PRP can pursue a contribution claim under Section 107. Plf's Opp. at 28.[12]

Second, ARC cannot rely on the "savings" clause in the last sentence of Section 113(f). Plf's Opp. at 14 (citing *Aviall*, 125 S. Ct. at 584). Through Section 113(f), Congress expressly delineated the circumstances under which contribution would thereafter be available under CERCLA. Congress did *not* codify some broader version of contribution that would have allowed liable private parties to seek contribution under *either* Section 113(f) or Section 107(a). "The sole function of the [savings clause] is to clarify that § 113(f)(1) does nothing to 'diminish' any cause(s) of action for contribution that may exist independently of § 113(f)(1)." *Aviall*, 125 S. Ct. at 583-584. In other words, the specific terms of the savings provision merely preserve whatever independ-

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107(a) claim is simply beside the point. *Id.* at 26. As ARC points out, interpretation of the statute of limitations provisions should not drive the Court's interpretation of CERCLA's substantive provisions. *Id.* at 26 (citing *Pinal Creek*, 113 F.3d at 1305).

[12] In other *Key Tronic* dicta, the Supreme Court rejected an attempt to find an express right to sue under Section 107. *See* 511 U.S. at 818 n.11.

ent rights to contribution exist outside of § 113(f)(1), such as under state law or under Section 113(f)(3)(B). *See supra* n.3; *see, e.g., United States v. Locke*, 529 U.S. 89, 105 (2000); *see also Atherton v. FDIC*, 519 U.S. 213, 227-228 (1997). The savings clause does not *create* a backup for any private PRP who does not meet the prerequisites of Sections 113(f) to bring a stand-alone claim for contribution under Section 107(a) that post-SARA courts have uniformly found does not exist.[13] "There is no reason why Congress would bother to specify conditions under which a person may bring a contribution claim, and at the same time allow contributions actions absent those conditions." *Aviall*, 125 S. Ct. at 583. The *Aviall* Court went on to state that "the savings clause[] does not change our conclusion." *Id.*

Third, although courts do not consult legislative history where the language of the statute is clear, *see, e.g., Lamie v. United States Trustees*, 520 U.S. 526, 539-540 (2004), the legislative history here does not support ARC's position. Plf's Opp. at 22-23. Both the Senate and House bills confirm that Congress intended to restrict contribution actions to those situations where there has been a Section 106 or 107(a) civil action or an administrative or judicially approved settlement, which is consistent with the traditional common law understanding of contribution and the mechanisms provided in Section 113(f). *See* S. Rep. No. 99-11, at 103 (1985) (proposed Section 107(*l*)(2)); H.R. Rep. No. 99-253, Pt. 1, at 13 (1985) (proposed Section 113(g)(1)).

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[13] *See Elementis*, 2005 WL 236488, at *10 (rejecting plaintiff's argument that *Aviall*'s statement regarding the savings clause renders "inappropriate" the line of cases like *Bedford Affiliates*).

Fourth, there is no merit to ARC's speculation that the enforcement choices of the United States Environmental Protection Agency ("EPA") could substantially favor some PRPs over others. Plf's Opp. at 24. Generally, when EPA issues a unilateral administrative order under Section 106 of CERCLA, the agency first offers the recipient an opportunity to enter an administrative order on consent, which would give rise to a contribution claim under Section 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B).

Fifth, ARC's proffered policy and equity considerations cannot overcome the plain terms of Sections 107(a) and 113(f). Plf's Opp. at 22-24. In the future, Congress may decide to make a legislative judgment that a PRP who undertakes a cleanup in the absence of the prerequisites in Section 113(f) should nonetheless be able to recover costs from other PRPs. But it would be improper here for the Court to arrogate to itself the authority to override the statutory text on the basis of its own assessment of policy considerations. Indeed, the court in *Elementis* recognized that equally important policy considerations warrant limiting private PRPs to contribution claims under Section 113(f). A private PRP that cannot avail itself of the express right to contribution under 113(f)(1) still has "one remaining route to CERCLA relief" under Section 113(f)(3)(B) by entering into an administrative or judicially approved settlement. 2005 WL 236488, at *13. "To aid the expeditious resolution of environmental claims . . . Congress employed incentives for responsible parties to settle and strong disincentives for non-settling potentially responsible parties." *Id.* (citation and internal quotation marks omitted).

Finally, ARC recently submitted a letter to the Court suggesting that oral argument is necessary, in part, to address the "inconsistent position" that the United States is taking in a CERCLA enforcement action in the Eastern District of Tennessee.[14] There is no inconsistency, however. CERCLA provides the United States, as sovereign, with authority and a cause of action not available to private PRPs. *See* 42 U.S.C. §§ 104, 106, 107(a)(4)(A). Numerous courts have recognized that the United States, unlike a private PRP, is not limited to a claim in contribution, even where the United States is itself a PRP.[15]

CONCLUSION

For the reasons stated above and in the Defendant's Memorandum in Support of Motion to Dismiss for Failure to State a Claim, the United States respectfully request that the Court dismiss ARC's amended complaint.

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[14] *See* Letter from Robert A. Matthews to the Honorable Harry F. Barnes, dated February 25, 2005.

[15] *See, e.g., See, e.g., United States v. Chrysler Corp.*, 157 F. Supp.2d 849 (N.D. Ohio 2001) (National Park Service, owner of contaminated land, could sue under Section 107(a), and obtain joint and several liability, despite its own potential liability); *United States v. Kramer*, 757 F. Supp. 397, 414 (D.N.J. 1991) ("The Government's potential liability for contribution does not affect this section 107(a) response costs recovery action."); *United States v. Monsanto Co.*, 858 F.2d 160, 164 & n.2, 173 & n.28 (4th Cir. 1988) (upholding decision to allow the United States to bring a Section 107 joint and several action when largest PRPs were United States agencies).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 8, 2005, the foregoing Defendant's Reply Memorandum in Support of Motion to Dismiss for Failure to State a Claim was served by overnight delivery on the following counsel of record:

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-3152

ATLANTIC RESEARCH CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal From The United States District Court
For The Western District Of Arkansas,
El Dorado Division

The Honorable Harry F. Barnes

[Filed: Oct. 12, 2005]

BRIEF OF APPELLANT
ATLANTIC RESEARCH CORPORATION

---

* * * * *

STATEMENT OF THE ISSUES

Whether, Pursuant To CERCLA Section 107(a)(4)(B), or Under Federal Common Law, A Potentially Responsible Party ("PRP") Who Is Liable Under CERCLA Has A Cause Of Action Under CERCLA To Recover An

Equitable Share Of Response Costs From Another PPR, Even In The Absence Of A Prior Or Pending Section 106 Or 107 Civil Action Or A Section 113(f)(3)(B) Settlement.

The District Court held that in *Dico Inc. v. Amoco Oil Co.*, 340 F.3d 525 (8th Cir. 2003), this Court "appeared" to have resolved this issue, "holding that . . . a party that is subject to CERCLA liability is limited to seeking contribution from other jointly liable parties [other PRPs] in accordance with Section 113(f) . . ." (A-Ap. 4).[1] Because the United States Supreme Court recently held that Section 113(f) does not authorize a PRP to sue another PRP for contribution absent having been sued under Sections 106 or 107(a) of CERCLA, or absent having resolved its liability through an administrative or judicially approved settlement, see *Cooper Industries Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004), the District Court felt that it had no alternative but to dismiss ARC's contribution action despite the fact that the result was "patently unfair" to ARC. The District Court expressed hope that this Court would "give attention" to this unfairness if it chooses to "revisit the holding of *Dico*." (A-Ap. 6).

ARC respectfully submits that *Dico* does not compel dismissal of its Amended Complaint, and that both Section 107(a)(4)(B) and federal common law permit ARC to recover an equitable share of its response costs from another PRP which, in this case, is the United States.

Apposite cases: *Aviall, supra*; *Dico, supra*; *Control Data Corp.* v. *S.C.S.C. Corp.*, 53 F.3d 930 (8th Cir. 1995); *Consolidated Edison Co. of N.Y. v. UGI Utilities*, ___

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[1] Reference to A-Ap. is to ARC's Appendix.

F.3d ___, 04-2409-CV (2d Cir., Sept. 9, 2005), 2005 WL 2173585.

* * * * *

No. 06-562

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

ATLANTIC RESEARCH CORPORATION'S BRIEF IN SUPPORT OF GOVERNMENT'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a party that is potentially responsible for the cost of cleaning up property contaminated by hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.*, may bring a contribution action against another potentially responsible party under § 113(f) of CERCLA, 42 U.S.C. § 9613(f), after having established, by declaratory judgment, the other party's liability under § 107(a), 42 U.S.C. § 9607(a).

2. Whether a party that is potentially responsible for the cost of cleaning up property contaminated by hazardous substances under CERCLA, 42 U.S.C. § 9601, *et seq.*, but that does not satisfy the requirements for bringing an action for contribution under § 113(f), may bring a contribution action against another potentially responsible party under § 107(a), or federal common law.

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STATEMENT

Atlantic Research Corporation ("ARC") supports the government's Petition for a Writ of Certiorari. Needless to say, ARC does not agree with the government's claim that the holding below is incorrect (Pet., pp. 15-23); however, the government correctly asserts that the issue presented is important and warrants review at this time (Pet., pp. 2-6, 8-14, 24-26).

While ARC agrees that review is warranted, ARC disagrees with the government's characterization of the "issue" to be decided. The government identifies the issue as one "left open" by this Court in ***Cooper Industries, Inc. v. Aviall Services, Inc.***, 543 U.S. 157 (2004) – whether a PRP may bring a cost recovery action against another PRP under § 107(a) of CERCLA, 42 U.S.C. § 9607(a), or federal common law, despite having no right to bring such an action under § 113(f), 42 U.S.C. § 9613(f) (Pet., p. 2). There is no dispute but that ***Aviall*** left this issue "open," and while the government correctly observes that the issue has received inconsistent treatment by the lower courts (Pet., pp. 9-13), this is not the sole issue to be resolved. Indeed, the issue identified by the government need not be resolved at all because ARC has a viable § 113(f) contribution claim in this case.

ARC's action against the government consists of two separate and distinct claims. First, ARC seeks a declaration that the government, along with ARC, has CERCLA liability for contaminating the Camden, Arkansas site. Second, ARC seeks recovery of an equitable share of the monies it has expended to remediate the Camden site. While the second issue has triggered the current debate over the existence of a statutory or common law source for

awarding ARC the monetary relief it seeks, the issue is moot if ARC has a viable claim for declaratory relief. This is because ARC's claim for declaratory relief is, by necessity, a § 107(a) civil action triggering ARC's right to seek contribution under § 113(f).

ADDITIONAL REASONS FOR GRANTING THE PETITION

ARC acknowledges that while ***Aviall*** held that the "natural meaning" of § 113(f)(1) is that "contribution may be sought subject to the specified conditions, namely, 'during or following' a specified civil action," *i.e.*, "during or following any civil action under § 9606 . . . or under § 9607(a) . . . ," 543 U.S. at 160, 166-67, the Court apparently limited that right to cases where the PRP seeking contribution had itself been sued under § 106 or § 107(a):

> Section 113(f)(1) specifies that a party may obtain contribution 'during or following any civil action' under CERCLA § 106 or § 107(a). The issue we must decide is whether a private party *who has not been sued* under § 106 or § 107(a) may nevertheless obtain contribution under § 113(f)(1) from other liable parties. We hold that it may not. . . .
>
> Section 113(f)(1), . . . authorizes contribution claims only 'during or following' a civil action under § 106 or § 107(a), and it is undisputed that *Aviall has never been subject to such an action*. Aviall therefore has no § 113(f)(1) claim. (emphasis added)

Aviall, 543 U.S. at 160, 167.

Although the Court seemingly held that the PRP seeking contribution under § 113(f) must first have been sued in a § 106 or § 107(a) action, nothing in CERCLA supports that holding. Section 113(f) unequivocally provides that "*any* person may seek contribution from *any* other person who is liable or potentially liable under § 9607(a) . . . during or following *any* civil action under . . . § 9607(a)." (emphasis added) This provision raises the question whether absent being sued under § 107(a), a person may nevertheless bring an action for declaratory relief seeking an adjudication of another's joint liability or potential joint liability under § 107(a) and, if so, is such an action a civil action under § 107(a)? If a viable declaratory judgment action is a "civil action under § 107(a)," and if the declaratory judgment action establishes the liability or potential liability of another PRP, then, by definition, the prevailing PRP may seek contribution under § 113(f). That is, if ARC has stated a viable claim for declaratory relief, and if its claim constitutes a § 107(a) civil action, then ARC's action was "pending" when ARC also sought contribution (partial cost recovery) from the government. Because ARC has stated a viable claim for declaratory relief, and because such a claim is a § 107(a) civil action, ARC is entitled to seek contribution from the government under § 113(f)(1).

While the government successfully argued in the district court that ARC's request for response costs from the government could not be maintained under § 107(a), the government never challenged ARC's separate request "declaring Defendant strictly liable for necessary response costs, consistent with the National Contingency Plan, relating to the Camden Site [and] declaring Defendant liable as a former owner, a former operator, and arranger

. . . pursuant to CERCLA § 107(a), 42 U.S.C. § 9607(a). . . . " Indeed, each of ARC's requests for declaratory relief was based upon the government's actual or potential liability under § 107(a). Because the government did not oppose ARC's request for declaratory relief, ARC has commenced a civil action under § 107(a) which permits it to seek contribution under § 113(f)(1).

That § 107(a) necessarily forms the predicate for ARC's request for declaratory relief flows from the fact that, as most courts have observed, no § 113(f)(1) action for contribution can be maintained absent a viable § 107(a) action to establish liability. For example, in ***Control Data Corp. v. S.C.S.C.***, 53 F.3d 930, 934-36 (8th Cir. 1995), the court observed:

> . . . Recovery of response costs by a private party under CERCLA is a two step process. Initially, a plaintiff must prove that the defendant is liable under CERCLA. Once that is accomplished, the defendant's share of liability is apportioned in an equitable manner.
>
> CERCLA liability is established under 42 U.S.C. § 9607(a) . . . [I]n order to prove liability, a plaintiff must show that a defendant is within one of the four classes of covered persons enumerated in [§ 107(a)]; that the plaintiff has incurred response costs as a result; and that the costs were necessary and consistent with a national contingency plan. . . .
>
> . . .
>
> Once liability is established, the focus shifts to allocation. Here the question is what portion of the plaintiff's response costs will the defendant

> be responsible for? Allocation is a contribution claim controlled by 42 U.S.C. § 9613(f). . . .
>
> . . .
>
> Under CERCLA, if a responsible party, as defined by [§ 107(a)] releases hazardous substances into the environment, and the release causes the incurrence of response costs, then the party is liable . . . for any other necessary costs of response incurred by any other person consistent with a national contingency plan. . . . [O]nce a person is liable, it is liable for its share, as determined by § 9613(f). . . .

Similarly, in ***Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.***, 153 F.3d 344, 350 (6th Cir. 1998), the court held that while § 107(a) exclusively governs claims for full cost recovery or indemnity, contribution claims are predicated upon both § 107(a) and § 113(f) working in conjunction – that the contribution remedy under § 113(f) is available to a PRP who is the defendant in a § 107(a) action, or who can assert a viable claim under § 107(a):

> The government . . . asserts that CERCLA does not provide two separate causes of action but that the two sections, § 107(a) and § 113(f) work in conjunction. It argues that an action for contribution must be brought pursuant to § 107(a), but is governed by § 113(f). In other words, the government asserts that § 113(f) applies to claims asserted under § 107(a). The government points out that § 107 provides the basis and the elements of a claim for recovery of response costs and lists the parties who are liable, as well as the defenses to liability. Therefore, one must necessarily look to § 107 in contribution actions

> involving § 113(f). Under such a reading, if § 113(f) is incorporated under § 107, then a § 113(f) action is an action to recover the necessary costs of response by any other person, as referred to in § 107. The action only happens to be an action for contribution. We agree.
>
> . . . Section 107(a) clearly establishes the right of parties to seek "necessary costs of response." It does not specify whether those costs will arise from joint and several liability or sound in contribution. . . . [A]s the government asserts, parties seeking contribution under § 113(f) must look to § 107 to establish the basis and elements of the liability of the defendants. . . . [I]t is § 107(a) that establishes the cause of action for contribution. While a party seeking contribution under § 113(f) may not recover under joint and several liability, it is clear that under a plain reading of the statute, the party is seeking to recovery its necessary costs of response as referred to in § 107(a).

See also ***County Line Investment v. Tinney***, 933 F.2d 1508, 1516-17 (10th Cir. 1991) ("Section 107(a) must be the source for any right to contribution. . . . [Contribution] claims are dependant upon the establishment of a *prima facie* case of liability under § 107"); ***Reynolds Metal Co. v. Arkansas Power & Light Co.***, 920 F. Supp. 991, 996-97 (E.D. Ark. 1996) ("[I]n CERCLA actions . . . while the defendant PRP's liability will initially be predicated upon § 107(a) (to establish, as a threshold matter, that the defendant PRP can be held liable for response costs under CERCLA), its ultimate liability, i.e., the amount it will be required to pay the plaintiff RP and/or PRP, will be limited by the equitable share requirement of § 113(f)"); ***New Jersey Turnpike Auth. v. PPG Industries, Inc.***, 197 F.3d 96, 104 (3rd Cir. 1999) ("A § 113 plaintiff must

demonstrate that the defendants are liable or potentially liable under § 107; the elements for both claims are essentially the same. . . . However, § 113 does not in itself create any new liability; rather, it confirms the right of a potentially responsible person under § 107 to obtain contribution from other potentially responsible persons"); ***Pinal Creek Group v. Newmont Mining Corp.***, 118 F.3d 1298, 1302, (9th Cir. 1997) ("[W]hile § 107 created the right of contribution, the "machinery" of § 113 governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 107"); ***Sun Co. v. Browning Ferris Inc.***, 124 F.3d 1187, 1190-91 (10th Cir. 1997) ("Section 113(f) did not create a new cause of action, nor did it create new liabilities. . . . It is no more than a mechanism for apportioning [CERCLA] – defined costs").

As each of these cases demonstrates, while the remedy of full cost recovery or indemnity is available only under § 107(a), all contribution claims must be predicated upon establishing the liability of another PRP under § 107(a). This is true whether the liability claim is asserted during or following a § 107(a) claim instituted by the government, or whether the liability claim is asserted by a PRP in a declaratory judgment action.[1] The Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*, permits a PRP to establish

[1] There is a difference between entitlement to contribution in the context of a § 107(a) action for declaratory relief and a § 113(f)(1) contribution claim made by a PRP that is the subject of a § 107(a) action by the government. In the former, the plaintiff PRP must have incurred response costs, which is a condition to asserting any § 107(a) liability claim, whereas a PRP that is the subject of a § 107(a) action by the government may assert a § 113(f)(1) contribution claim even if no response costs have yet been incurred by the PRP.

another's CERCLA liability via § 107(a) because that is the *only* substantive basis for asserting any CERCLA liability claim – a prerequisite for obtaining contribution.[2] ARC is, therefore, entitled to maintain a § 107(a) claim for declaratory relief seeking a determination that the government is jointly and severally liable with ARC for the contamination at the Camden, Arkansas site. Courts have long recognized that PRP's have a right to seek such declaratory relief. *See, e.g.,* ***Wickland Oil Terminals Inc. v. ASARCO***, 792 F.2d 887, 893 (9th Cir. 1986); ***Pinole Point Properties Inc. v. Bethlehem Steel Corp.***, 596 F. Supp. 283, 291-92 (N.D. Cal. 1984); ***Jones v. Inmont Corp.***, 584 F. Supp. 1425, 1430 (S.D. Ohio 1984); ***Bulk Distribution Center Inc. v. Monsanto Co.***, 589 F. Supp. 1437 (S.D. Fla. 1984).

In short, even if, *arguendo*, § 107(a) affords only the remedy of indemnity or full cost recovery, and even if, *arguendo*, ARC has no implied right of contribution under § 107(a) nor any federal common law right to contribution separate from § 113(f), this does not alter the fact that ARC's declaratory judgment action is based entirely upon

---

[2] That Section 107(a) necessarily forms the predicate for ARC's declaratory judgment flows from the fact that the Declaratory Judgment Act, 28 U.S.C. § 2201, is procedural, and thus cannot provide the substantive basis for any claim – it is underlying federal law that determines whether any legitimate cause of action may be asserted. *See, e.g.,* ***Skelly Oil Co. v. Phillips Petroleum Co.***, 339 U.S. 667, 671, 70 S. Ct. 76, 94 L. Ed. 1194 (1950) (the Declaratory Judgment Act is procedural only); *see also* ***Aetna Life Insurance Co. v. Hayworth***, 300 U.S. 227, 239-40, 57 S. Ct. 461, 81 L. Ed. 617 (1937); ***Caldwell v. Gurley Refining Co.***, 755 F.2d 645, 652 (8th Cir. 1984) (declaratory judgment action is premised upon CERCLA liability); ***Gopher Oil Co. v. Bunker***, 84 F.3d 1047, 1048-49, 1051 (8th Cir. 1996) (declaratory judgment action based upon CERCLA liability).

§ 107(a) – because ARC has incurred response costs, and because there is an existing dispute between ARC and the government as to the latter's joint and several liability with ARC under § 107(a), ARC is entitled to seek a declaration that the government is jointly and severally liable with ARC. What this means is that ARC's declaratory judgment action is a § 107(a) civil action, thereby triggering ARC's right to seek contribution from the government under § 113(f)(1) if the latter is adjudged jointly and severally liable with ARC.

CONCLUSION

For each of the above reasons, ARC respectfully asks the Court to grant the government's Petition for a Writ of Certiorari.

Respectfully submitted.

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No. 06-562

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENT ATLANTIC RESEARCH CORPORATION

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QUESTIONS PRESENTED

1. Whether a party that is potentially responsible for the cost of cleaning up property contaminated with hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, but that does not satisfy the requirements for bringing an action for contribution under Section 113(f) of CERCLA, 42 U.S.C. 9613(f), may bring an action against another potentially responsible party for cost recovery under Section 107(a), 42 U.S.C. 9607(a).

2. In the alternative, if the aforementioned potentially responsible party has no express cause of action under Section 107(a) to recover a portion of the response costs incurred, whether the party has an implied right to contribution afforded by Section 107(a).

RULE 29.6 STATEMENT

There is no parent corporation or any publicly held corporation that owns 10% or more of Respondent's stock.

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INTRODUCTION

The issue in this case is whether, under CERCLA, § 107(a)(4)(B), 42 U.S.C. 9607(a)(4)(B), a company that is potentially responsible for cleaning up a contaminated site or paying for a cleanup, a so-called "PRP," and that does so *voluntarily*, may recover an equitable share of its costs from other PRPs. A voluntary cleanup occurs where there is no order, judgment or settlement compelling the PRP to clean up a site, nor is there any pending civil action seeking to compel such a cleanup.

If partial cost recovery is denied to PRPs that voluntarily clean up contaminated sites, not only would respondent Atlantic Research Corporation ("ARC") be unfairly forced to absorb substantial cleanup costs which, in large part, are attributable to activities of the Department of Defense, but other PRPs will forego voluntary cleanups altogether. Also, if partial cost recovery is unavailable, the government will be substantially insulated from having to shoulder its share of responsibility for contaminating numerous sites throughout the country, despite having waived its sovereign immunity. These results would undermine CERCLA's twin goals of promoting prompt, voluntary remediation of hazardous waste sites, and requiring PRPs, such as the Department of Defense, to assume their fair share of cleanup costs.

ARC submits that PRPs that voluntarily clean up contaminated sites have *always* been entitled to recover an equitable share of their response costs from other PRPs. In the period dating from CERCLA's enactment in 1980 until passage of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613 ("SARA"), courts unanimously held that § 107(a)(4)(B) expressly provided PRPs that voluntarily

clean up sites with the right to obtain partial cost recovery from other PRPs. The *only* issue prior to SARA was whether a PRP that was *compelled* to clean up a site, or to pay for site cleanup, had a right to contribution under CERCLA – a right not expressly provided by the Act. These pre-SARA courts concluded that a right to contribution could be implied from the Act or existed as a matter of federal common law.

SARA was enacted in 1986 to confirm and codify this right to contribution. SARA did not purport to even address, much less modify, curtail or withdraw, the well-established and separate right of partial cost recovery afforded by § 107(a)(4)(B) to PRPs that voluntarily cleaned up contaminated sites. Indeed, no contribution issue was involved in those cleanups because they were not performed under compulsion, nor were the PRPs voluntarily performing them jointly liable with any other PRP, both necessary elements of contribution.

Although many post-SARA appellate courts concluded that partial cost recovery claims by PRPs that voluntarily cleaned up sites were actually contribution claims to be brought under § 113(f), the reason courts did so was their mistaken view that *all* claims for partial cost recovery could and should be maintained as § 113(f) actions, and that § 107(a)(4)(B) claims necessarily resulted in joint and several liability for indemnity – a remedy reserved for non-PRPs.

In *Cooper Indus. Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), this Court corrected the first of the above misconceptions, holding that § 113(f) does not permit *all* PRPs to seek partial cost recovery – but only those that have been sued in a § 106 or § 107(a) civil action, or those PRPs that have resolved their CERCLA liability by

settlement with the United States or a State. This case presents the Court with the occasion to correct the second misconception embraced by many post-SARA courts – that § 107(a)(4)(B) is not a source of partial cost recovery for PRPs that voluntarily clean up a contaminated site, but is reserved exclusively for non-PRPs that are entitled to recover indemnity from PRPs on a joint and several liability basis. Indeed, the Second, Seventh and Eighth Circuits have now repudiated those erroneous post-SARA, pre-*Aviall* decisions, correctly holding that PRPs voluntarily cleaning up contaminated sites have a viable § 107(a)(4)(B) claim for partial cost recovery.

SUMMARY OF ARGUMENT

CERCLA liability is governed by § 107(a)(4), providing that a "covered person" – a "PRP," "*shall be liable for* (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary *costs of response incurred by any other person* consistent with the national contingency plan; . . . ." (emphasis added). What this means is that a PRP cannot be *liable* to another for a claim under CERCLA unless and until: (1) a governmental entity incurs "costs of removal or remedial action" at a particular site, or (2) a private party incurs "costs of response" at a given site.[1]

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[1] "Response costs" include all costs associated with "removal of hazardous substances" and "remedial action," §§ 101(23) and (24), and also include all "enforcement activities related thereto." Section 101(25). Of course, "response costs" may be incurred by a PRP that would not render any other PRP "liable," *i.e.*, if there were a viable defense to liability under § 107(b), or if the response costs incurred were unnecessary or inconsistent with the national contingency plan.

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For ease of reference, where no response costs have been incurred by any person other than a given PRP that has voluntarily incurred them – *i.e.*, not under the compulsion of any order, judgment or settlement, or a civil action seeking to compel a cleanup, the PRP will be referred to herein as a "voluntary remediator." Conversely, where a PRP has been compelled to clean up a site or to pay for a cleanup, either by order, judgment or settlement, the PRP will be referred to as a "compelled remediator." In the present case, ARC is a "voluntary remediator."

The government claims that all PRPs are excluded from the term "any other person" in § 107(a)(4)(B), and thus must confine their partial cost recovery claims to contribution actions under § 113(f). Stated another way, the government contends that only "innocent parties," *i.e.*, non-PRPs, are included within the term "any other person" in § 107(a)(4)(B). Alternatively, the government argues that even if PRPs are "other persons" within § 107(a)(4)(B), § 113(f) still provides the *exclusive* source of cost recovery (contribution) to *all* PRPs, including both voluntary remediators and compelled remediators. The government insists that only "innocent parties" are entitled to seek response costs under § 107(a)(4)(B).

ARC will establish that *all* PRPs are included within the term "any other person" in § 107(a)(4)(B). The government's contrary claim: (1) makes no grammatical sense and has been rejected by *every* court interpreting and applying § 107(a)(4)(B); (2) is inconsistent with a parallel

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However, a necessary condition for the accrual of any cause of action asserting CERCLA liability under § 107(a) is the incurrence of response costs, including "an enforcement activity," by the party bringing the suit.

and complementary provision in CERCLA; (3) is contrary to the EPA's own interpretation of § 107(a)(4)(B); (4) would lead to unreasonable and unjust consequences; and (5) would conflict with the core principles underlying CERCLA.

ARC will also establish that the government's fall-back argument – that even if § 107(a)(4)(B) includes PRPs, voluntary remediators have no viable claim under that provision and must sue under § 113(f) – is equally flawed. First, the government ignores the critical difference between a *compelled remediator* that is liable under CERCLA for cleaning up a contaminated site, or paying for that cleanup, and a *voluntary remediator* that, although potentially responsible for site cleanup, is not actually liable under CERCLA for cleaning up a site, but does so despite the absence of any order, judgment or settlement compelling cleanup, and without any CERCLA civil action seeking to compel cleanup.[2]

Indeed, although the government now conveniently ignores this distinction, less than one year ago, in an *amicus curiae* brief filed in *Metropolitan Water Reclamation Dist. of Greater Chicago v. No. Amer. Galvanizing and Coating, Inc.*, 473 F.3d 824 (7th Cir. 2007), the government emphasized its importance in determining whether a party could proceed with a § 107(a)(4)(B) cost recovery claim:

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[2] This distinction between compelled remediators and voluntary remediators is significant for purposes of contribution, which requires, *inter alia*, *compelled payment* by one sharing a *joint or common liability* with another. *See, e.g., Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 350-51 (6th Cir. 1998); *see also* § 113(f)(1), providing that cost allocation in CERCLA contribution actions occurs only "among *liable* parties. . . ." (emphasis added) Thus, compelled remediators may seek partial cost recovery under § 113(f), while voluntary remediators do not – the latter obtain partial cost recovery under § 107(a)(4)(B).

> Under [§ 107(a)(4)(B)], *persons who are not themselves liable* may cleanup contaminated property and then invoke [§ 107(a)(4)(B)] to seek reimbursement from the same four categories of PRPs that are subject to government cleanup or cost recovery actions.

(Gov't. *Amicus* Br., pp. 7, 10) (emphasis added). Because voluntary remediators such as ARC are not "liable" under CERCLA when they voluntarily undertake cleanups, even under the government's view of § 107(a)(4)(B), articulated in *Metropolitan Water*, they may invoke that provision "to seek reimbursement from the same ... PRPs that are subject to government cleanup or cost recovery actions."

Second, the government's objection to voluntary remediators recovering a portion of their response costs under § 107(a)(4)(B) is based upon a flawed premise – that cost recovery under this provision necessarily results in joint and several liability for indemnity only, a remedy reserved for non-PRPs. The government insists that because all voluntary remediators are still PRPs, they necessarily bear *some* responsibility for contamination at a given site, and thus may not impose joint and several liability for indemnity upon any other PRP. Instead, the government argues, partial cost recovery is the only available remedy to voluntary remediators, and that remedy is afforded *solely* by § 113(f).

The problem with the government's argument is that nothing in CERCLA *requires* joint and several liability for indemnity be imposed upon PRPs under § 107(a)(4)(B).[3] Rather, in cases such as this one, involving the United

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[3] This Court implicitly recognized this fact in *Aviall, supra*, 543 U.S. at 171, n.6: "We do not address whether a § 107 cost recovery action ... may seek some form of liability other than joint and several."

States as a PRP, § 107(a)(4)(B) permits a voluntary remediator to recover a *portion* of its costs, *i.e.*, to impose several liability only, just as in the contribution remedy provided by § 113(f). The liability of the United States in all such § 107(a)(4)(B) actions should be several only because it would be inappropriate to hold taxpayers jointly liable for the contamination caused by all other PRPs responsible for contaminating a site. ARC, a voluntary remediator, seeks to recover only its equitable share of response costs from the United States as a result of ARC's having voluntarily incurred first instance response costs at the Camden, Arkansas site. ARC's cost recovery action against the United States is authorized by § 107(a)(4)(B); ARC is not confined to a non-existent contribution claim under § 113(f), as the government claims.

ARGUMENT

I. THE GOVERNMENT'S INTERPRETATION OF "ANY OTHER PERSON" IN § 107(a)(4)(B) IS INCONSISTENT WITH: (A) THE PLAIN MEANING OF THE PROVISION AND OVER 25 YEARS OF CERCLA JURISPRUDENCE; (B) A PARALLEL AND COMPLEMENTARY PROVISION IN CERCLA; (C) THE EPA'S OWN INTERPRETATION OF § 107(a)(4)(B); (D) A RATIONAL LIABILITY SCHEME UNDER CERCLA; AND (E) THE PRIMARY PURPOSES OF CERCLA.

A. The Plain Meaning Of The Phrase "Any Other Person" Is To Differentiate Between Governmental Entities And Non-Governmental Entities, Including PRPs.

Contrary to the government's claim that the word "other" in § 107(a)(4)(B) refers to, and thereby excludes, PRPs (Gov't. Br., pp. 11, 15), the purpose of the phrase

"any other person" is to differentiate the nature, scope and conditions of cost recovery by governmental entities under § 107(a)(4)(A), from the nature, scope and conditions of recovery by private entities under § 107(a)(4)(B). Not only do governmental entities recover *all* of their response costs, as opposed to *necessary* costs of response recoverable by non-governmental entities, but it is undisputed that, as the government has argued for years, the purpose of the phrase "not inconsistent with the national contingency plan" ("NCP") is to make clear that when governmental entities seek to recover response costs, it is presumed the costs incurred are consistent with the NCP, thereby imposing upon PRPs the burden of proving otherwise. Under § 107(a)(4)(B), however, private parties bear the burden of proving the costs incurred were consistent with the NCP. *See, e.g., United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 579 F. Supp. 823, 850-51 (W.D. Mo. 1984); *United States v. Ward*, 618 F. Supp. 884, 899-900 (E.D.N.C. 1985); *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984, 1008-09 (D.S.C. 1984).

The government's interpretation of § 107(a)(4)(B) has been rejected repeatedly by courts considering the issue. In one of the earliest CERCLA cases, *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135, 1141-42, (E.D. Pa. 1982), the City, a voluntary remediator, argued that defendants were liable for a portion of the City's necessary costs of response under § 107(a)(4)(B). The defendant PRPs contended, however, as the government argues here, "that the term 'any other person' as used in 42 U.S.C. § 9607(a)(4)(B) does not include a party which itself is subject to liability under the act." The district court rejected the argument, holding that although § 107(a)(4)(B)

was not "a model of clarity, the provision does not specifically exclude parties that may be liable . . . nor does its language support such a construction."

In the latest case addressing the government's claim, *Metropolitan Water*, *supra*, the Seventh Circuit also rejected the government's interpretation of § 107(a)(4)(B):

> Nothing in subsection (B) indicates that a potentially liable party . . . should not be considered 'any other person' for purposes of a right of action.
>
> Certainly, as the EPA points out, the word 'other' in that phrase should be given meaning as a distinguishing term. Yet, we disagree that the word 'other' distinguishes 'any other person' from the four categories of potentially responsible parties listed earlier in subsections (1) through (4) of § 107(a). Rather, we read 'other' as distinguishing 'any other person' from the 'United States Government,' a 'State' or an 'Indian tribe,' the parties listed in the immediately preceding subsection. *Id.* These parties, as subsection (A) states, may recover costs '*not inconsistent* with the national contingency plan.' *Id.* § 9607(a)(4)(A) (emphasis added). By contrast, 'any other person' is limited to recovery of those costs '*consistent* with the national contingency plan.' *Id.*, § 9607(a)(4)(B) (emphasis added). Thus, we read the two subsections, and the referenced 'any other person' simply as the statute's way of relaxing the burden of proof for governmental entities as opposed to private parties.

473 F.3d at 835. Indeed, in the 25 years between *Stepan* and *Metropolitan Water*, every court addressing the government's proffered interpretation of § 107(a)(4)(B) has

rejected it,[4] and every court interpreting § 107(a)(4)(B) has held that PRPs are among the "other persons" referenced in that provision.[5]

Despite these facts, the government makes two additional arguments to support its strained interpretation of § 107(a)(4)(B). First, the government claims that legislative history underlying § 107(a)(4)(B) indicates that PRPs are not included in the term "any other person." This is because an initial 1980 draft provision of § 107(a)(4)(B) read "any person," purportedly including PRPs, but was later changed to read "any other person,"

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[4] *See, e.g., Wickland Oil Terminals v. ASARCO, Inc.*, 792 F.2d 887, 890-91 (9th Cir. 1986); *Artesian Water Co. v. New Castle County*, 605 F. Supp. 1348, 1357 n.11 (D. Del. 1985); *City of New York v. Exxon Corp.*, 633 F. Supp. 609, 617 (S.D.N.Y. 1986); *Chesapeake & Potomic Tel. Co. of Va. v. Peck Iron & Metal Co, Inc.*, 814 F. Supp. 1269, 1277 (E.D. Va. 1992); *United States v. Taylor*, 909 F. Supp. 355, 362-63 (M.D.N.C. 1995); *Adhesives Research v. American Inks & Coatings Corp.*, 931 F. Supp. 1231, 1246 (M.D. Pa. 1996); *Cos. for Fair Allocation v. Axil Corp.*, 853 F. Supp. 575, 579 (D. Conn. 1999); *Control Data Corp. v. S.C.S.C.*, 53 F.3d 930, 936, n.9 (8th Cir. 1986); *Idlywoods Assoc. v. Mader Capital, Inc.*, 915 F. Supp. 1290, 1313 (W.D.N.Y. 1996); *Sayreville v. Union Carbide Corp.*, 923 F. Supp. 671, 679-80 (D.N.J. 1996); *Consolidated Edison Co. v. UGI Utilities, Inc.*, 423 F.3d 90, 99-100 (2nd Cir. 2005); *Atlantic Research Corp. v. United States*, 459 F.3d 827, 835 (8th Cir. 2006).

[5] *See, e.g., Wickland, supra*, 792 F.2d at 890-91; *Pinole Point Properties, Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 290-91 (N.D. Cal. 1984); *United States v. New Castle County*, 642 F. Supp. 1258, 1262-64 (D. Del. 1986); *Stepan, supra*, 544 F. Supp. 1135 at 1143; *Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 916-17 (D. Okla. 1987); *Bulk Distribution Centers, Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1443 (S.D. Fla. 1984); *Adhesives Research, supra*, 931 F. Supp. at 1238 (citing cases); *Artesian Water, supra*, 605 F. Supp. at 1356; *Centertor, supra*, 153 F.3d at 349-50; *Barton Solvents, Inc. v. Southwest Petro-Chem, Inc.*, 1993 U.S. Dist. LEXIS 14337, *8-9, 38 E.R.C. 1022 (D. Kan. 1993); *Con. Ed., supra*, 423 F.3d 99-100; *Atlantic Research, supra*, 459 F.3d at 835.

thereby signifying their deletion – at least as the government sees it. (Gov't. Br., pp. 18-19). The government's claim finds no support in the legislative commentary, and is easily explained by the fact that use of "any person" in proposed § 107(a)(4)(B) would have overlapped § 107(a)(4)(A). Because § 107(a)(4)(B) imposes liability for response costs incurred by governmental entities, "persons" as defined in § 101(21), the originally-proposed § 107(a)(4)(B) would have provided different remedies with different conditions for "any person," including both private parties and the government. Congress added the word "other" to preclude that duplication. There is no basis for the government's speculation that the change from "any person" to "any other person" was meant to exclude PRPs that would have been included in the preliminary draft.[6]

The government's second argument is that there was no need for Congress to distinguish governmental entities from private parties by use of the term "any other person" because the antecedent term "any other necessary costs of response" in § 107(a)(4)(B) did so – *i.e.*, those costs, recoverable by private parties, are different from "all costs of removal or remedial action" recoverable by governmental entities under § 107(a)(4)(A). (Gov't. Br., p. 20.) If the government were correct, § 107(a)(4)(B) would have provided "any other necessary costs of response consistent with the NCP." This is a hopelessly confusing sentence

[6] In any event, as the government concedes, Gov't. Br., p. 19, the legislative history does not reveal the reason for the change and is *not* inconsistent with the fact that PRPs qualify as "other persons" in § 107(a)(4)(B). *See, e.g., Martin v. Hadix*, 527 U.S. 343, 357 (1999) ("[T]he inference respondents draw from the legislative history is speculative . . . [because] it rests on [an] assumption [about] the *reason* [for the amendment]") (emphasis in original).

because it requires the reader to infer that "private parties" are the subject of this sentence, rather than governmental entities, and it creates confusion concerning the nature of, and conditions to recovering, the referenced response costs.[7]

Moreover, there are additional problems with the government's hypothesis. The government impermissibly gives the word "other" two different functions in the same clause: "other" in "other necessary costs" refers to § 107(a)(4)(A), while "other" in "any other person" refers not to § 107(a)(4)(A), but to § 107(a)(1)-(4), which lists the four categories of PRPs. Such inconsistencies must be avoided if possible; repetition of language in a statute should serve identical functions. *See, e.g., Clark v. Martinez*, 543 U.S. 371, 378 (2005).

Additionally, the government's interpretation of "any other person" conflicts with the rule of the last antecedent, which states that "a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 343 (2005). The phrase "any other person" distinguishes those parties entitled to use § 107(a)(4)(B) from the immediately preceding list of government entities authorized to use § 107(a)(4)(A).

Finally, if it meant to prevent all PRPs from inclusion in § 107(a)(4)(B), Congress surely would have done so in 1986, when it added SARA. Instead, Congress confirmed

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[7] Indeed, under the government's reasoning, its interpretation of "other" in "other necessary costs" would itself be superfluous. If only non-PRPs are included in § 107(a)(4)(B), as the government argues, those persons cannot recover the costs recoverable by government entities under § 107(a)(4)(A), meaning that there is no need for "other" preceding "costs of response."

and ratified the interpretation that courts uniformly had given CERCLA in the period 1980-1986 – holding that PRPs were included in § 107(a)(4)(B). Indeed, it was the very fact that § 107(a)(4)(B) rendered PRPs liable to other PRPs for response costs they incurred, *i.e.*, that PRPs were included as "other persons" in § 107(a)(4)(B), that led pre-SARA courts to hold that where a *compelled* remediator incurred response costs, that party had an implied right to seek contribution from other PRPs.

For example, in *United States v. New Castle County*, 642 F. Supp. 1258 (D. Del. 1986), the court held that while voluntary remediators had an express right under § 107(a)(4)(B) to seek partial cost recovery from other PRPs for voluntarily incurred first instance response costs, the issue was not so clear where a compelled remediator was involved. Because there was some question whether compelled payments constituted "response costs" at all under § 107(a)(4)(B), and whether the "any other person" referenced in § 107(a)(4)(B) included compelled remediators, and because Congress had not expressly provided contribution rights for those compelled remediators, the issue was whether contribution rights could be "implied" from § 107(a)(4)(B):

> The court agrees with the weight of authority and holds that a private right of action is authorized under CERCLA pursuant to section 107(a)(4)(B). The right of action emanates from the plain language of the section and provides relief to any person incurring response costs for which another person is otherwise liable under the Act.
>
> . . . Defendant/Third Party Plaintiffs argue that the same plain language of section 107(a)(4)(B)

> which supports a private right of action necessarily authorizes the right of a responsible party once sued to recover from another responsible party. This result, however, is not mandated by the plain language of section 107(a)(4)(B). Two phrases within section 107(a)(4)(B) raise serious questions as to the applicability of that provision as authority for a right to contribution. First, it is not clear that once a responsible party has been sued his monetary expenditures to abate an environmental hazard qualify as 'necessary costs of response' under the Act. Second, it is unclear whether the phrase 'any other person' in section 107(a)(4)(B) means only individuals engaged in voluntary cleanup or whether it also includes individuals who are CERCLA Defendants engaged in cleanup compelled by the threat of imminent statutory liability.
>
> The courts are in basic agreement on the fundamental question of whether a right to contribution exists under CERCLA. Most courts have held that the right does exist. Still, they have been unable to agree on the source of that authority. . . .

New Castle County, 642 F. Supp. at 1262.

The court proceeded to find that contribution was available to compelled remediators because § 107(a)(4)(B) expressly authorized cost recovery by one PRP against another, and because the legislative history underlying CERCLA disclosed that Congress authorized courts to determine a PRP's right to contribution as a matter of federal common law. Indeed, to support its conclusion that compelled remediators had a right to contribution under § 107(a)(4)(B), the court referenced the reasons for the pending SARA amendments, which were reflected in the legislative commentary:

> New subsection 113(f)(1) of CERCLA [contribution] also ratifies current judicial decisions that the courts may use their equitable powers to apportion the costs of clean-up among the various responsible parties involved with the site. Courts should resolve claims for apportionment on a case-by-case basis pursuant to Federal common law, taking relevant equitable considerations into account. . . .
>
> The amendment is necessary because the Supreme Court, in recent decisions, has refused to imply a right of contribution under other statutes unless expressly stated. These decisions could create doubt regarding the existence of a right of contribution under [CERCLA], despite several recent district court cases correctly confirming that we intend the law to confer such a right. . . .
>
> . . . All of the expert witnesses appearing before the Committee agree that the right to contribution should be codified in order to encourage responsible parties to engage in clean-up and settlement. *The committee proposal would codify the right and, retaining current law, would allow a judge the discretion and flexibility to best manage the contribution issues in a lawsuit. . . .*
>
> As with joint and several liability issues, contribution will be resolved pursuant to Federal common law.

New Castle County, 642 F. Supp. at 1267-68, citing 131 Cong. Rec. H11083 (daily ed. Dec. 5, 1985); 131 Cong. Rec. S11855, 11857 (daily ed. Sep. 20, 1985); S. Rep. No. 11, 99th Cong., 1st Sess. 44 (1988) (emphasis added).[8]

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[8] In *Aviall, supra*, 543 U.S. at 162, the Court observed: "After CERCLA's enactment in 1980, litigation arose over whether § 107 . . . allowed a PRP that had incurred response costs to recover costs from

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The decision in *New Castle County* is especially significant because it held that a compelled remediator's right to contribution was dependent upon the fact that, as previous courts had concluded, PRPs had potential response cost liability to other PRPs as "other persons" under § 107(a)(4)(B). This same conclusion was reached by every pre-SARA court dealing with the issue of a compelled remediator's implied or common law right to contribution. *See, e.g., New York v. Shore Realty Corp.*, 648 F. Supp. 255, 260 (E.D.N.Y. 1986) ("As a private party, however, Shore [a compelled remediator] must base its third party action for contribution from past owners and operators of the site . . . on section 107(a)(4)(B) of CERCLA, which allows recovery of response costs 'consistent with the [NCP]' "); *Sand Springs Home, supra*, 670 F. Supp. at 916-17; *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1492 (D. Colo. 1985); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 226 (W.D. Mo. 1985).[9]

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other PRPs. More specifically, the question was whether a private party that had incurred response costs voluntarily and was not itself subject to suit, had a cause of action for cost recovery against other PRPs. Various courts held that § 107(a)(4)(B) . . . authorized such a cause of action. [citing *Wickland* and *Stepan, supra*] . . . [L]*itigation also ensued over the separate question whether a private entity that had been sued in a cost recovery action (by the Government or by another PRP) could obtain contribution from other PRPs.*" (Emphasis added). Thus, this Court recognized that the issue of contribution for compelled remediators was a wholly different issue from whether voluntary remediators could recover under § 107(a)(4)(B), which pre-SARA courts uniformly held they could. *See also Con. Ed., supra*, 423 F.3d at 97-98.

[9] The government contends that in *United States v. Westinghouse Elec. Corp.*, IP 83-9-C, 1983 WL 160587 (S.D. Ind. June 29, 1983), the district court held that PRPs had no implied right to contribution (Gov't. Br., pp. 5, 27). Notably, *Westinghouse* did not even mention § 107(a)(4)(B) in its decision, and certainly did not hold that PRPs could not be held liable for response costs incurred by voluntary remediators

(Continued on following page)

Not surprisingly, after SARA's passage in 1986, which confirmed and codified a compelled remediator's implied right to contribution under § 107(a)(4)(B), courts unanimously held that a PRP's right to contribution in § 113(f)(1) flowed solely from the fact that under § 107(a)(4)(B), PRPs, as "other persons," were liable to other PRPs that incurred recoverable response costs – that § 113(f) created no new rights, but provided only the "machinery" for permitting compelled remediators to obtain contribution from other PRPs, which had its source in § 107(a)(4)(B). *See, e.g.*, *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301-02 (9th Cir. 1996) ("[T]he Pinal Group . . . as 'any other person' under § 107, can hold other PRPs liable. . . . While § 107 creates the right of contribution, the 'machinery of § 113' governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 107."); *United States v. ASARCO, Inc.*, 814 F. Supp. 951, 956 (D. Colo. 1993) ("Section 113(f) . . . does not create the right of contribution – rather, the source of a contribution claim is § 107(a). Section 107(a) governs liability, while § 113(f) creates a mechanism for apportioning that liability among responsible parties."); *In the Matter of Reading Co.*, 115 F.3d 1111, 1118-19 (3rd Cir. 1997) ("The 'any other costs of response' language within § 107(a)(4)(B) forms the basis for [plaintiff's] claim for [partial] recovery under that section. . . .

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under that provision. Indeed, the plaintiff in *Westinghouse* based its implied contribution claim not upon § 107(a), but rather upon § 106. This was because the defendant in *Westinghouse* was not even a PRP. Courts have repeatedly held that, for these reasons, *Westinghouse* is of no precedential import. *See, e.g., ASARCO, supra*, 608 F. Supp. at 1492; *Sand Springs, supra*, 670 F. Supp. at 917; *Conservation Chem., supra*, 619 F. Supp. at 228.

The language of § 113(f), permitting contribution, replaced the judicially-created right to contribution under § 107(a)(4)(B)."); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1122 (3rd Cir. 1997) ("Section 113 does not in itself create any new liabilities, rather it confirms the right of a [PRP] under § 107 to obtain contribution from other [PRPs]."); *Sun Co. Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1191 (10th Cir. 1997) (" . . . § 113(f) did not create a new cause of action, nor did it create any new liabilities. . . . It is no more than a 'mechanism' for apportioning CERCLA-defined costs . . . [W]hile a § 113 contribution action is not a "cost recovery" action under § 107 . . . because it does not impose strict joint and several liability on the defendant PRPs, it is an action for recovery of the costs referred to in § 107 . . . [A] PRP's contribution action seeks to recover costs referred to in § 107 from PRPs whose liability is defined by § 107"); *Centerior Service Co., supra*, 153 F.3d at 350 ("The government asserts that . . . § 107 provides the basis and the elements of the claim for recovery of response costs and lists the parties who are liable, as well as defenses to liability, . . . that a § 113(f) action is an action to recover the necessary costs of response by any other person, as referred to in § 107. The action only happens to be an action for contribution. We agree.").

The holdings in each of these cases was premised upon the fact that absent a PRP's right to sue another PRP for response costs under § 107(a)(4)(B), as one of the "other persons" referenced therein, there never would have been an implied right to contribution in the first place. Stated another way, if, in 1980, Congress had not authorized PRPs to seek cost recovery from other PRPs in § 107(a)(4)(B), as the government now contends Congress did not, pre-SARA courts would have never overridden

that Congressional intent by implying a right of contribution from § 107(a)(4)(B).

The government now asks the Court to overrule 25 years of precedent to hold that PRPs are not included in § 107(a)(4)(B), and to find that § 113(f) created an exclusive cost recovery remedy for all PRPs, which did not exist prior to 1986. The government makes this claim despite the fact that it not only argued in *Centerior, supra*, that § 107(a)(4)(B) is the source of all § 113(f) contribution rights, but it did the same as an *amicus curiae* in *Aviall*: "Section 107(a)(4)(B)'s reference to 'any person' is broad enough to allow one jointly liable party to sue another for the former's response costs." (Gov't. *Amicus* Br., pp. 20-21.)

The Court should reject the government's *volte face*. To adopt the government's new interpretation of § 107(a)(4)(B) as excluding PRPs would not only ignore Congress's intent in enacting CERCLA and SARA, but would discard the well-reasoned decisions of countless courts holding just the opposite. Prior to SARA, courts unanimously held that voluntary remediators had an express right to seek partial cost recovery under § 107(a)(4)(B), and compelled remediators had an implied right to seek contribution. Congress added § 113(f) to remove any doubt about this latter implied right to contribution. However, Congress left intact the universally-recognized right of voluntary remediators to seek partial cost recovery under § 107(a)(4)(B). As the Court of Appeals noted below, if Congress had intended SARA to withdraw the well-established right of voluntary remediators to recover a portion of their response costs under § 107(a)(4)(B), Congress would have

done so explicitly. 459 F.3d at 836.[10] Not only did Congress not do so, but it emphasized that SARA was intended to confirm and ratify pre-SARA decisions interpreting § 107(a)(4)(B). Both prior to and after SARA, PRPs were and are among the "other persons" referenced in § 107(a)(4)(B).

B. The Government's Interpretation Of § 107(a)(4)(B) Conflicts With § 111(a).

In addition to providing parties with the opportunity to recover response costs from other PRPs, CERCLA created the so-called "Superfund" to help pay for cleanup costs. The primary purposes for which the Superfund was created were to finance "governmental response" and to pay "claims." *Exxon Corp. v. Hunt*, 475 U.S. 355, 360 (1986). To this end, § 111(a) provides, *inter alia*:

> The President shall use the money in the Fund for the following purposes:
>
> (1) Payment of governmental response costs incurred pursuant to § 9604 of this title . . . [*i.e.*, costs incurred by the United States to investigate and clean up sites].
>
> (2) Payment of any claim for necessary response costs incurred by *any other person* as a result of carrying out the national contingency plan. . . . (emphasis added).

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[10] This fact is consistent with this Court's characterization of the SARA amendments. *Aviall*, *supra*, 543 U.S. at 162-63, and n.8, *supra*. Also, as this Court has made clear, "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents . . . and that it expected its enactment to be interpreted in conformity with them." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979).

The § 111(a)(1) and (a)(2) language closely parallels the § 107(a)(4)(A) and (B) language: compare "payment of governmental response costs incurred pursuant to § 9604 of this title" (§ 111(a)(1)) to "all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the [NCP]" (§ 107(a)(4)(A)), and "payment of any claim for necessary response costs incurred by any other person as a result of carrying out the [NCP]" (§ 111(a)(2)) to "any other necessary costs of response incurred by any other person consistent with the [NCP]" (§ 107(a)(4)(B)). This statutory parallelism establishes that the phrase "any other person" in § 111(a)(2) refers to any person other than a governmental entity, and the same phrase in § 107(a)(4)(B) has the same meaning. Because PRPs are included in the term "any other person" in § 111(a)(2), *see* 40 C.F.R. § 300.700(d)(5) and 307.22(b) (permitting PRPs to recover from the Superfund), PRPs are included in the same "any other person" language in § 107(a)(4)(B).

C. The Government's Interpretation Of § 107(a)(4)(B) Conflicts With The EPA's Interpretation Of That Provision.

If the government's position is that § 107(a)(4)(B) clearly excludes PRPs, one has to ask why the EPA itself, for over 20 years, has consistently taken the position that the phrase "any other person" in § 107(a)(4)(B) refers to persons "other than a governmental entity," not "other than a PRP." When the EPA proposed amendments to the NCP in 1985, it specifically stated that PRPs could bring claims under § 107(a)(4)(B): "The new § 300.71 addresses the requirements the NCP imposes on parties other than the lead agency (including responses by *responsible*

parties, other private parties and Federal and State governments)." 50 Fed. Reg. 5862, 5870 (1985) (emphasis added). Because a "responsible party's" satisfying the NCP is relevant only if that party may recover response costs under § 107(a)(4)(B), the EPA's directive necessarily means that, in the EPA's view, § 107(a)(4)(B) includes PRPs within its scope.

If there were any doubt, it is resolved by the current C.F.R. provisions, which unequivocally provide that "any person," including PRPs, may recover response costs under § 107(a)(4)(B). 40 C.F.R. § 300.700, which addresses NCP requirements for "other persons," states:

> (c) Section 107(a) cost recovery actions. . . .
>
> . . .
>
> (2) Responsible parties shall be liable for necessary costs of response actions to releases of hazardous substances incurred by any other person consistent with the NCP.
>
> (3) For purposes of cost recovery under § 107(a)(4)(B) of CERCLA:
>
> . . .
>
> (ii) any response action carried out in compliance with the terms of an order issued by EPA pursuant to § 106 of CERCLA, or a consent decree entered into pursuant to § 122 of CERCLA, will be considered 'consistent with the NCP'.

Because only PRPs may be the subject of a § 122 consent decree or a § 106 order, the EPA has acknowledged that PRPs are "other persons" under § 107(a)(4)(B). The government's claim that PRPs are excluded from that provision cannot be reconciled with the regulations enacted by the agency designated to enforce CERCLA. As this Court has repeatedly recognized, an agency's interpretation of its regulations is "of controlling weight unless it

is plainly erroneous or inconsistent with the regulations." *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965), quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). The government's recent about-face is inconsistent with EPA's longstanding and justified interpretation of its own regulations.

D. Acceptance Of The Government's Interpretation Of § 107(a)(4)(B) Would Have Unreasonable Consequences.

The government's premise that Congress intended to provide PRPs that are *compelled* to engage in response actions, or to pay for them, with the right to obtain partial cost recovery under § 113(f), but to deny cost recovery to all voluntary remediators, is manifestly unreasonable and contrary to public policy. As the Court of Appeals observed below: "We discern nothing in CERCLA's words suggesting Congress intended to establish a comprehensive contribution and cost recovery scheme encouraging private cleanup of contaminated sites, while simultaneously excepting – indeed penalizing – those who voluntarily assume such duties." 459 F.3d at 836. The fact is SARA did not disturb the well-recognized right of PRPs that voluntarily incur first instance response costs in cleaning up contaminated sites to obtain partial cost recovery under § 107(a)(4)(B). *See* pp. 15, 19-20 and nn.8 and 10, *supra*. SARA was enacted to address contribution issues only, and confirmed the right to contribution for compelled remediators. The § 107(a)(4)(B) right to partial cost recovery by voluntary remediators was explicit and well-established; it needed no Congressional confirmation. As the Court of Appeals observed in this case, "[I]f Congress intended Section 113 to completely replace Section 107 in all circumstances,

even where a plaintiff was not eligible to use Section 113, it would have done so explicitly." 459 F.3d at 836.

Finally, the government's interpretation of § 107(a)(4)(B) would produce uniquely unreasonable results at the many thousands of sites – including the site at issue in this case – that have been contaminated by departments and agencies of the United States itself. These include not just the sites actually owned and operated by the United States, but also the many private sites to which the United States has contributed hazardous waste. If the government's interpretation of § 107(a)(4)(B) were correct, absent state action at a site, the government is effectively insulated from liability because no voluntary remediator, such as ARC, can ever recover response costs from the government.

Section 120(a)(1) of CERCLA provides that the United States is liable "in the same manner and to the same extent ... as any non-governmental entity, including liability under [§ 107]." Significantly, EPA has long been prohibited from proceeding against other federal agencies under CERCLA (*see* Exec. Order No. 12580, § 4(a), 52 Fed. Reg. 2923 (Jan. 23, 1987)). Thus, the government's interpretation of § 107(a)(4)(B) necessarily means that unless a State sues a PRP, or enters into a settlement agreement with a PRP, including the United States, the latter can avoid all CERCLA liability by simply deciding not to sue, or to enter into any settlement agreement with, a PRP. This result undermines the Congressional purpose of § 120(a), *i.e.*, placing the United States on an equal footing with private PRPs. This is particularly problematic because the United States, unlike private PRPs, cannot be sued under state law in state courts.

While none of these facts was terribly significant prior to *Aviall* because a pending or completed CERCLA civil action was not a § 113(f) prerequisite for recovering response costs, after *Aviall*, the absence of any enforcement action by the United States would effectively provide the government with a "get out of jail free card," unless a given state takes action to remediate a site. It was this claim to quasi-immunity by the government that lead the Eighth Circuit to characterize the government's claim that voluntary remediators have no cost recovery claim under § 107(a)(4)(B) as "bizarre:"

> A contrary ruling, barring [ARC] from recovering a portion of its costs, is not only contrary to CERCLA's purpose, but results in an absurd and unjust outcome. Consider: in this, of all cases, the United States is a liable party (who else has rocket motors to clean?). It is, simultaneously, CERCLA's primary enforcer at this, among other Superfund sites. . . .
>
> If we adopted the Government's reading of § 107, the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle. This bizarre outcome would eviscerate CERCLA whenever the government, itself, was partially responsible for a site's contamination.
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> . . .
>
> The Court, then, concludes Congress resolved the question of the United States' liability 20 years ago. It did not create a loophole by which the Republic could escape its own CERCLA liability by perversely abandoning its CERCLA enforcement power. *Congress put the public's right to a clean and safe environment ahead of the sovereign's traditional immunities.*

459 F.3d at 837 (emphasis added). This Court should similarly reject the government's irrational interpretation of § 107(a)(4)(B).

E. The Government's Interpretation Of § 107(a)(4)(B) Also Undermines The Principal Purposes Underlying CERCLA.

For 25 years, courts have repeatedly recognized CERCLA's principal purposes are to achieve the swift, effective and voluntary clean up of contaminated sites and to make those responsible for the contamination pay for the cleanups. *See, e.g.*, H.R. Rep. No. 96-1016, pt. 1, at 16-17 (1980) (CERCLA "would also establish a federal cause of action . . . to induce such persons voluntarily to pursue appropriate environmental response actions."); 131 Cong. Rec. 24725, 24730 (1985) ("The goal of CERCLA is to achieve effective and expedited cleanup. . . . One important component . . . must be the encouragement of voluntary cleanup actions or funding without having the President rely on the panoply of administrative and judicial tools available."). *See also Key Tronic v. United States*, 511 U.S. 809, 815, n.6 (1994); *Artesian Water Co., supra*, 605 F. Supp. at 1356; *Bulk Distribution Centers, supra*, 589 F. Supp. at 1443-44; *Colorado v. ASARCO, Inc., supra*, 608 F. Supp. at 1491.

The government's interpretation of § 107(a)(4)(B) would defeat rather than advance the Congressional purposes underlying CERCLA. First, by excluding PRPs from § 107(a)(4)(B), the government would discourage PRPs from undertaking prompt cleanups on a voluntary basis; PRPs would have a disincentive to clean up contaminated sites. Second, the government's interpretation of § 107(a)(4)(B) violates the "polluter pays" principle. Here,

although both ARC and the United States (Department of Defense) are responsible for the contamination, ARC bears 100% of the cost, and the United States avoids liability altogether.

This clash with the principal purposes of CERCLA, among other reasons, prompted the Second, Seventh and Eighth Circuits to reject the government's interpretation of § 107(a)(4)(B). As the Seventh Circuit observed in *Metropolitan Water*, *supra*, 473 F.3d at 836:

> . . . [W]e are concerned that prohibiting suit by a voluntary plaintiff like Metropolitan Water may undermine CERCLA's twin aims of encouraging expeditious, voluntary environmental cleanups while holding responsible parties accountable for the response costs that their past activities induced. As *Consolidated Edison, Atlantic Research*, and several post-*Cooper Industries* district court decisions have recognized, in order to further CERCLA's policies, potentially responsible parties must be allowed to recover response costs even before they have been sued themselves under CERCLA or have settled their CERCLA liability with a government entity. Were a cost recovery action unavailable in these circumstances, the Second Circuit reasoned, 'such parties would likely wait until they are sued to commence cleaning up any site for which they are not exclusively responsible because of their inability to be reimbursed for cleanup expenditures in the absence of a suit.' *Consol. Edison*, 423 F.3d at 100. As the court concluded, this result 'would undercut one of CERCLA's main goals, encouraging private parties to assume the financial responsibility of cleanup costs by allowing them to seek recovery from others.'

See also dissenting opinion of Judge Sloviter in *E. I. du Pont de Nemours & Co. v. United States*, 460 F.3d 515, 547-49 (3rd Cir. 2006).[11]

The government's proffered interpretation of § 107(a)(4)(B), excluding PRPs from its scope, undermines CERCLA's goals as it will inevitably discourage and delay cleanups. PRPs at the vast majority of contaminated sites where there is no governmental suit or settlement will escape having to pay anything because there will be no CERCLA mechanism to provide cost recovery to PRPs who want to do the right thing and voluntarily clean up contaminated sites. Moreover, the government can largely avoid its responsibility for cleaning up a site simply by taking no enforcement action. Such results cannot be countenanced; *all* PRPs unquestionably fall within "other persons" language in § 107(a)(4)(B), as every court considering the issue for the last 25 years has held.

II. VOLUNTARY REMEDIATORS, SUCH AS ARC, HAVE A VIABLE COST RECOVERY ACTION UNDER § 107(a)(4)(B).

Because PRPs are included in the term "any other person" in § 107(a)(4)(B), application of that provision in this case results in the following statutory directive: "[The United States] shall be liable for . . . necessary costs of response incurred by [ARC] consistent with the [NCP]." Regardless of whether this language is deemed to create an express cause of action or only an implied one in favor of ARC,[12] it undisputedly creates a cause of action. The

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[11] These recent observations are nothing new. As far back as 1986, in *New Castle County, supra*, 642 F. Supp. at 1264-65, the court came to the very same conclusions.

[12] *See Key Tronic, supra*, 511 U.S. at 818 and n.11, 822.

only remaining question is whether that cause of action may be asserted under § 107(a)(4)(B), or whether it must be asserted exclusively under § 113(f), as the government maintains.

Section 113(f), as its heading denotes, governs actions for contribution. As previously observed, contribution is a remedy available to persons who are jointly liable to a third party, and one of the jointly-liable parties is compelled to pay more than its fair share of that liability. *See Centerior, supra*, 153 F.3d at 350-51; *Con. Ed., supra,* 423 F.3d at 97-98. Prior to § 113(f) becoming a part of CERCLA in 1986, courts were confronted with two separate and distinct issues relating to cost recovery by PRPs: (1) whether *voluntary remediators* could recover a portion of their response costs from other PRPs directly under § 107(a)(4)(B), and (2) whether *compelled remediators* could recover a portion of their response costs from other PRPs as "contribution" under CERCLA.

The first issue was easily resolved – courts unanimously held that voluntary remediators had a right to obtain partial cost recovery under § 107(a)(4)(B). *See supra*, pp. 13-20. Contribution was not even an issue in these cases because plaintiff PRPs were not compelled to undertake any cleanup action or to pay for any such action undertaken by others, and there was no joint liability with any other PRP. Indeed, voluntary remediators, while *potentially responsible* for cleaning up a site or paying for a cleanup, were not *actually liable* under CERCLA at all; this was because no other person had incurred any response costs at the site (including the absence of enforcement activities) – a necessary condition for the accrual of any CERCLA liability. Thus, the issue of contribution did not even arise in these cases.

The issue not so easily resolved was whether *compelled remediators* had a right to contribution from other PRPs, a right not expressly found in § 107(a)(4)(B). These compelled remediators had been required to perform a response action or to pay for a response action and were jointly liable with other PRPs. Pre-SARA courts held that a right to contribution could be implied from the provisions in § 107(a)(4)(B), and the "savings clause" in § 107(e)(2). *See* pp. 15-20, 23-24, *supra*. Section 113(f) was added in 1986 to confirm and codify this right to contribution. It is undisputed that Congress did not intend to modify, curtail or withdraw any other right of cost recovery provided in § 107(a), such as the right voluntary remediators had to obtain partial cost recovery under § 107(a)(4)(B). *Id.*

Although post-SARA appellate decisions erroneously determined that *all* claims for partial cost recovery could be maintained under § 113(f), *i.e.*, claims by voluntary remediators and compelled remediators alike, which *Aviall* corrected, there is no question but that this "correction" did not disturb the fact that, as all pre-SARA courts had held, voluntary remediators have a right to seek partial cost recovery from other PRPs. Now, as was the case prior to the post-SARA courts' misdirecting all claims for partial cost recovery to § 113(f), the source of partial cost recovery for voluntary remediators is § 107(a)(4)(B). *See Con. Ed., supra*, 423 F.3d at 100. The government's arguments to the contrary not only repudiate the position it took as an *amicus curiae* in *Metropolitan Water*, to the effect that § 107(a)(4)(B) permits cost recovery by parties who perform a cleanup without having any actual CERCLA liability or obligation to do so, *see* pp. 5-6, *supra*, but the government's arguments do not withstand analysis in any event.

A. Allowing A Voluntary Remediator To Proceed Under § 107(a)(4)(B) Has No Effect On The Applicable Statute Of Limitations.

The government first argues that if § 107(a)(4)(B) is interpreted to permit voluntary remediators to initiate cost recovery actions, it would allow them to avoid the shorter 3-year statute of limitations applicable to contribution claims brought pursuant to §§ 113(f)(1) and 113(f)(3)(B), which is contained in § 113(g)(3) – that it would inappropriately enable voluntary remediators to "elect" the longer 6-year statute of limitations for cost recovery actions contained in § 113(g)(2). (Gov't. Br., p. 30-31.) This is untrue.

There is no "option" afforded any PRP to "elect" which statute of limitations applies. Rather, the applicable statute of limitations is defined by the language in §§ 113(g)(2) and (g)(3). Even a cursory reading of those provisions discloses that the 3-year statute of limitations in § 113(g)(3) applies only to contribution actions by PRPs seeking reimbursement for response costs they have been compelled to pay to another party, either by way of judgment or by settlement. The 3-year statute of limitations provision does not apply to first instance response costs. Courts have repeatedly held that all actions for first instance response costs, whether asserted in a cost recovery claim under § 107(a)(4)(B), *i.e.*, by a voluntary remediator, or in a contribution action under § 113(f)(1), *i.e.*, by a compelled remediator, are not governed by the 3-year statute of limitations in § 113(g)(3), but by the 6-year statute of limitations in § 113(g)(2). *See, e.g., Taylor, supra*, 909 F. Supp. at 365; *Centerior, supra*, 153 F.3d at 355; *Sun Co. Inc., supra*, 124 F.3d at 1192-93; *Pinal Creek, supra*,

118 F.3d at 1305, n.7.[13] Recognizing that voluntary remediators have a viable § 107(a)(4)(B) action does not provide them with any "option" to elect a more favorable statute of limitations.

B. Nothing In CERCLA Requires Courts To Impose Joint And Several Liability In All Cost Recovery Actions Brought Under § 107(a)(4)(B).

Next, the government contends that if voluntary remediators may assert § 107(a)(4)(B) claims against other PRPs, the former would be able to impose joint and several liability for indemnity upon the latter, thus rendering them liable for contamination caused by every other PRP, including those no longer in existence or no longer solvent (*i.e.*, for so-called "orphan shares" of liability). According to the government, this is inappropriate because voluntary remediators must bear some responsibility for contamination at a site, and thus can recover only an equitable share of response costs, a "quintessential contribution claim" governed by § 113(f). The result, according to the government, is that § 113(f) is the sole source of a voluntary remediator's right to partial cost recovery. (Gov't. Br., pp. 13, 31-34, 37.) There are a number of flaws in the government's characterization of § 107(a)(4)(B) and § 113(f).

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[13] Notably, a PRP's settlement with the United States or a State, which may lead to a contribution action under § 113(f)(3)(B), includes settlements involving "costs of a response action," *i.e.*, compelled "cost reimbursement," and, separately, settlements resulting in the PRP's undertaking a compelled first-instance response action, *i.e.*, "for some or all of a response action.". A contribution action filed after this latter type of settlement is necessarily governed by the 6 year statute of limitations in § 113(g)(2).

First, a claim for partial cost recovery is not a "quintessential claim for contribution." Contribution *always* requires compelled payment by a party sharing a common or joint liability with another. *See, e.g., Centerior, supra*, 153 F.3d at 350-51; *Con. Ed., supra*, 423 F.3d at 97-98. While several liability, as opposed to joint and several liability, is a *result* of a successful contribution claim, it is not an *element* of that claim. The fact that a plaintiff is entitled to impose only several liability upon another party does not convert the claim into one for contribution.[14]

Second, nothing in CERCLA *requires* the imposition of joint and several liability under § 107(a)(4)(B). As the Court of Appeals held below, " . . . § 107 is not limited to parties seeking to recover 100% of their costs." 459 F.3d at 835. Rather, the issue of whether joint and several liability is appropriate under § 107(a)(4)(B) was intended by Congress to be determined by the courts on a case-by-case basis, employing principles of equity and fulfilling the purposes of CERCLA.

Beginning in 1983, in *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983), courts have held, with unanimity, that § 107(a)(4)(A) cost recovery actions by governmental entities result in joint and several liability requiring indemnity. These courts reasoned that joint and several liability was necessary to promote the effective enforcement of CERCLA by governmental entities, and best enabled the United States to recover its own expenditures and replenish the Superfund. *Chem-Dyne,*

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[14] Significantly, issues of joint and several liability versus several liability only arise where there are multiple sources of liability. If there is only one liable party, the plaintiff's contributory responsibility for harm is typically the subject of an affirmative defense, much like contributory negligence.

supra, 572 F. Supp. at 808; *United States v. Kramer*, 757 F. Supp. 397, 416-17 (D.N.J. 1991); *United States v. A & F Materials Co., supra*, 578 F. Supp. 1249, 1255.[15]

With little analysis, most courts also held that § 107(a)(4)(B) actions would result in joint and several liability for indemnity, subject to a contribution counterclaim. *See, e.g., Taylor, supra*, 909 F. Supp. at 364-66; *Kramer, supra*, 757 F. Supp. at 416-17; *Chesapeake, supra*, 814 F. Supp. at 1278-79; *Adhesives Research, supra*, 931 F. Supp. at 1243-44; *Charter Township of Oshtemo v. The Upjohn Co.*, 910 F. Supp. 332, 337 (W.D. Mich. 1995); *Cos. for Fair Allocation, supra*, 853 F. Supp. at 579-80; *Transportation Leasing Co. v. California*, 961 F. Supp. 931, 938 (C.D. Cal. 1992). The principal reason given was the perceived need to provide a sufficient incentive for PRPs to voluntarily clean up sites. The courts believed that absent the financial incentive provided by joint and several liability for indemnity, governmental entities would be forced to expend their limited resources to either perform the cleanups themselves or to compel them – an undesirable result. *Id.*

A number of courts, however, observed that joint and several liability is not necessarily appropriate in all § 107(a)(4)(B) actions – that there may be policy reasons or equitable considerations precluding its application. In *A & F Materials, supra*, 578 F. Supp. at 1255-56, after a

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[15] Governmental entities recovering under § 107(a)(4)(A) would be subject to contribution counterclaims or contribution-type equitable offsets. *See, e.g., United States v. Mottolo*, 605 F. Supp. 898, 910-11 (D.N.H. 1985); *Kramer, supra*, 757 F. Supp. at 412-17; *Conservation Chemical, supra*, 619 F. Supp. at 205; *Taylor, supra*, 909 F. Supp at 362. Also, "orphan shares" would be subject to allocation in that counterclaim. *See* n.16, *infra*.

thorough review of CERCLA's legislative history, the court concluded that Congress intended courts to determine the scope of liability on a case-by-case basis, and that § 107(a)(4)(B) claims, in appropriate cases, could result in several liability only.

A & F was followed by *Allied Chemical Corp. v. Acme Solvents Reclaiming Inc.*, 691 F. Supp. 1100, 1115-16 (N.D. Ill. 1988):

> Though the amendments under SARA are silent on the scope of liability under Section 107, the House did comment on the issue. In its report, the House stated that it 'fully subscribes to the reasoning of the court in the seminal case of *U.S. v. Chem-Dyne* . . . which established a uniform federal rule allowing for joint and several liability in *appropriate* CERCLA cases.' (emphasis added.)

The court in *Allied* held that a "moderate approach" to joint and several liability, adopted in *A & F*, was appropriate:

> The moderate approach involves employing the *Chem-Dyne*-Restatement rule as a general rule susceptible to exceptions. Under the moderate approach, if the court finds that the injury is indivisible, the court has the discretion to hold the defendants jointly and severally liable. The court may, on the other hand, reject joint and several liability, regardless of the indivisibility of the harm, where the peculiar facts of the case point to a more fair apportionment of liability.

691 F. Supp. at 1116-18; *see also Barton Solvents, Inc. v. Southwest Petro-Chem, Inc.*, 1993 U.S. Dist. LEXIS 14337, 38 E.R.C. 1022 (D. Kan. 1993); *In the Matter of Bell Petroleum Services, Inc.*, 3 F.3d 889, 895-902 (5th Cir. 1993); *United States v. Burlington Northern & Santa Fe*

Ry. Comm., No. 03-17169, *3224-3229 (9th Cir., March 16, 2007).[16]

While, hypothetically, there might be some circumstances justifying the imposition of joint and several liability for indemnity in § 107(a)(4)(B) actions, typically, the relief should be several liability – a contribution-like remedy permitting partial cost recovery. In any event, the issue is immaterial here. This is because ARC acknowledges that where a § 107(a)(4)(B) action is brought against the United States as a PRP, liability should be several only. There is no compelling policy reason supporting the imposition of joint and several liability upon the United States in cases such as this one; while the United States should be financially responsible for its own share of the contamination at a given site, taxpayers should not have to assume the liability of all other enterprises contributing to the contamination.

Because ARC does not seek to impose joint and several liability for full cost recovery against the United States, the so-called "joint and several liability" issue identified by the government is immaterial to the outcome of this case – all that ARC could ever expect to recover from the United States are the costs ARC has incurred exceeding its own fair share of responsibility.

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[16] The apportionment of so-called orphan shares, if any, would be resolved in apportionment proceedings. Under § 107(a)(4)(B), courts can and have allocated orphan shares among PRPs, including a plaintiff PRP. *See, e.g., Charter Township of Oshtemo v. Am. Cyanamid Co.*, 898 F. Supp. 508-09 (W.D. Mich. 1995); *United States v. Davis*, 31 F. Supp. 2d 45, 62 (D.R.I. 1998); *Chesapeake & Potomac, supra*, 814 F. Supp. at 1277-78; *Town of Windsor v. TESA Tuck, Inc.*, 919 F. Supp. 662, 681-82 (S.D.N.Y. 1996); JAMES T. O'REILLY & CAROLINE BROWN, RCRA AND SUPERFUND: A PRACTICE GUIDE, § 14.58 (citing cases) ("[N]othing in CERCLA prohibits allocating portions of the orphan shares to [PRPs].").

C. Courts Retain The Power To Protect Settling PRPs.

The government next contends that if voluntary remediators are allowed to bring cost recovery actions under § 107(a)(4)(B), they would be able to eviscerate the § 113(f)(2) contribution protection afforded compelled remediators that have resolved their liability to the United States or a State in an administrative or judicially-approved settlement. (Gov't. Br., pp. 13, 37-39.) Once again, the government invents a problem that does not exist.

The contribution bar in § 113(f)(2) applies to settlements with the United States or a State "regarding matters addressed in the settlement." The reach of the settlement agreement, then, is limited by what comes within the definition of "matters addressed." Parties other than the settling governmental entity may assert claims under § 107(a)(4)(A) and § 107(a)(4)(B) against a settling party where the claim is not one coming within the "matters addressed" in the settlement. *See, e.g., Akzo Coatings Inc. v. Aigner Corp.*, 30 F.3d 761, 765-70 (7th Cir. 1994). If the settlement only resolves costs incurred, or to be incurred, by the settling governmental entity, the scope of the contribution protection would not protect the settling party from a voluntary remediator's § 107(a)(4)(B) claim for partial cost recovery – that would not constitute a benefit the compelled remediator received as part of "settling its liability." However, if the settling party resolved its liability for response costs incurred by any person, including costs incurred by voluntary remediators, the contribution protection arguably would extend to § 107(a)(4)(B) claims by voluntary remediators. *Id.*

The fact that § 107(a)(4)(B) claims by voluntary remediators are not contribution claims *per se*, does not, however, enable voluntary remediators to avoid the effect of the contribution bar where the compelled remediator's settlement with the governmental entity actually provides that protection. This is because, as previously noted, joint and several liability is not mandated for all § 107(a)(4)(B) actions by voluntary remediators. Rather, courts may *always* protect settling parties, where appropriate, by limiting the liability of the settling party to the liability it has discharged in its settlement agreement with the governmental entity. In this manner, compelled remediators will receive precisely the same settlement protection they would obtain in any contribution claim against them. Recognizing a voluntary remediator's right to obtain partial cost recovery under § 107(a)(4)(B) will not permit it to make an end-run around the § 113(f)(2) settlement protection afforded settling parties as the government maintains.

D. The Availability Of § 107(a)(4)(B) Cost Recovery Claims Will Not Deter Settlements.

Next, the government claims that if voluntary remediators are allowed to bring cost recovery actions under § 107(a)(4)(B), there would be no incentive for those entities to enter into settlements with the United States or a State, because that would relegate them to seeking contribution from other PRPs under § 113(f)(3)(B). According to the government, this disincentive results from the "fact" that § 107(a)(4)(B) provides more generous remedies, including a longer statute of limitations, joint and several liability, indemnity, the ability to avoid the statutory bar precluding contribution actions against settling parties,

etc. (Gov't. Br., pp. 13-14, 31, 36-43.) Also, the government suggests that negotiated settlements are necessary to allow the government to directly control and supervise cleanups. (Gov't. Br., pp. 41-43.) Once again, the government is mistaken.

As previously noted, none of the government's so-called "advantages" of § 107(a)(4)(B) claims actually exists. Moreover, the availability of a § 107(a)(4)(B) cost recovery claim for voluntary remediators will not deter settlements; PRPs in ARC's position will still have a strong incentive to settle with the government because absent such a settlement, they may later become the subject of a government enforcement action or a cost recovery action. Also, settling parties enjoy the contribution immunity afforded by § 113(f)(2), and whenever a party undertakes a first instance response action pursuant to settlement with the government, the costs of such an action are deemed consistent with the NCP, thereby precluding the settling party from having to establish compliance with the NCP in order to recover response costs from others. *See* 40 C.F.R. § 300.700(c)(3)(ii). Establishing compliance with the NCP is both critical and onerous, however, when a voluntary remediator seeks cost recovery under § 107(a)(4)(B). *See* § 300.700(c)(3)(i) and 300.700(c)(5) and (6).

While the government may view cleanups undertaken pursuant to settlements as "preferable" to unsupervised voluntary cleanups, CERCLA manifestly does not require government approval in actions brought pursuant to § 107(a)(4)(B), as in the case where a party seeks recovery from the Superfund under § 111(a)(2). *See, e.g., Wickland, supra*, 792 F.3d at 891-92; *Pinole Point, supra*, 596 F. Supp. at 289-90; *Allied Chemical, supra*, 691 F. Supp. at 1106-08; 40 C.F.R. § 300.700(d) (requiring pre-authorization

from the EPA). Even the government concedes that *sua sponte* cleanups are better than no cleanup (Gov't. Br., pp. 41-42.). Indeed, as Judge Sloviter, dissenting in *E. I. du Pont, supra*, 460 F.3d at 549, recognized, it is one thing to *encourage* settlements, it is another to *require* them as a condition to obtaining partial cost recovery.

The EPA's expressed concerns about the quality of voluntary cleanups, referenced in the government's brief, pp. 40-43, hardly means that the EPA was suggesting to throw the baby out with the bath water – rather, instead of *requiring* settlements with government entities, which the government cannot be compelled to conclude, EPA encouraged settlements to avoid later problems with establishing that the remedial action complied with the NCP – otherwise, voluntary remediators have to carefully tailor their response activities to ensure compliance. The EPA also *suggested*, not *mandated*, some government involvement to ensure that site closure could be accomplished, and so that voluntary remediators would be able to obtain partial cost recovery from other PRPs, rather than face potential enforcement action by the government.

E. The Government's Reliance On Pre-*Aviall* Case Law Is Misplaced.

Finally, in arguing that § 113(f) is the sole cost recovery remedy available to voluntary remediators, the government relies on pre-*Aviall* cases holding that PRPs could only sue for cost recovery allocation under § 113(f), not § 107(a)(4)(B). (Gov't. Br., pp. 6, n.5, 30-31.) The essential predicate underlying all of these decisions was the mistaken view that § 107(a)(4)(B) necessarily imposed joint and several liability for indemnity, whereas § 113(f) provided the sole statutory basis for partial cost recovery,

i.e., several liability, and that § 113(f) permitted partial cost recovery by *all* PRPs, regardless of whether any § 106 or § 107(a) action had been filed, regardless of whether any given PRP was jointly liable with anyone, and regardless of whether response costs had been compelled by order, judgment or settlement. The courts' collective erroneous view of § 113(f) led them to conclude that § 113(f) would be rendered superfluous if partial cost recovery or "several liability" claims were recognized under § 107(a)(4)(B) – meaning that only non-PRPs could use that provision, as only non-PRPs are entitled to full cost recovery or indemnity. *See* cases cited in Gov't. Br., p. 6, n.5. As the Eighth Circuit described it, this "traffic directing" by pre-*Aviall* courts, compelling all PRPs to use § 113(f) to obtain partial cost recovery, "dramatically narrowed § 107 by judicial fiat." 459 F.3d at 832.

The first court to reject the flawed premise underlying the pre-*Aviall* cases was the Second Circuit Court of Appeals, in *Con. Ed., supra*, holding that voluntary remediators have a right to assert a § 107(a)(4)(B) cost recovery claim, whereas compelled remediators are confined to § 113(f) contribution actions. 423 F.3d at 100-102. The court distinguished its pre-*Aviall* decision in *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2nd Cir. 1998), on the ground that the PRP seeking cost recovery in that case had incurred response costs only after having entered into a consent decree, *i.e.*, only after resolving its liability as a compelled remediator.[17] *Id. See also Schaefer v. Town of*

[17] The court in *Con. Ed.* held that to the extent that § 107(a)(4)(B) permitted full cost recovery, the PRP defendant could file a § 113(f)(1) counterclaim for contribution, thereby reducing the plaintiff PRP's recovery by its allocated share of responsibility. 423 F.3d at 100, n.9. The court did not mention the issue of joint and several liability.

(Continued on following page)

Victor, 457 F.3d 188 (2nd Cir. 2006) (holding that response costs incurred *before* entering into a consent order were recoverable under § 107(a)(4)(B) because the plaintiff was a voluntary remediator at that time).

After *Con. Ed.*, the Eighth Circuit Court of Appeals in the present case agreed with the Second Circuit, holding that voluntary remediators may seek partial cost recovery under § 107(a)(4)(B), and also holding that this provision is not confined to claims seeking full cost-recovery or indemnity:

> We recognize that § 107 allows 100% cost recovery. Some pre-*Aviall* cases justified denying liable parties access to § 107, reasoning Congress would not have intended them to recover 100% of their costs and effectively escape liability . . .
>
> But § 107 is not limited to parties seeking to cover 100% of their costs. To the contrary, the text of § 107(a)(4)(B) permits recovery of 'any other necessary costs of response . . . consistent with the national contingency plan.' While these words may 'suggest full recovery,' . . . they do not compel it. . . . CERCLA, itself, checks overreaching liable parties: If a plaintiff attempted to use § 107 to recover more of its fair share of reimbursement a defendant would be free to counterclaim for contribution under § 113(f). *Consolidated Edison*, 423 F.3d at 100, n.9; *Redwing Carriers*, 94 F.3d at 1495. Accordingly, we find that allowing Atlantic's claim for direct recovery under § 107 is entirely consistent with the text and purpose of CERCLA.

459 F.3d at 835.

Because § 107(a)(4)(B) does not compel application of joint and several liability upon the United States, no contribution counterclaim is needed.

The court correctly concluded that to accept the government's claim that § 113(f) provided the sole source of cost recovery for voluntary remediators would mean that SARA withdrew the prior universally-recognized right of voluntary remediators to recover a portion of their response costs under § 107(a)(4)(B), which not only had no factual support, but directly conflicted with the legislative intent underlying SARA, *i.e.*, to ratify and confirm the pre-SARA interpretation given § 107(a)(4)(B): "[I]f Congress intended Section 113 to completely replace Section 107 in all circumstances, even where a plaintiff was not eligible to use Section 113, it would have done so explicitly." 459 F.3d at 836.

The Third Circuit came to the opposite conclusion in *E. I. du Pont, supra*. E. I. du Pont voluntarily undertook to clean up a site that formerly had been owned and allegedly contaminated by the United States, and then brought a CERCLA cost recovery action against the United States. In a 2-to-1 decision, the court concluded that *Aviall* did not give it cause to reconsider its pre-*Aviall* precedents which held that *all* PRPs were limited to contribution claims under § 113(f). The court held that § 107(a)(4)(B) provided no basis for E. I. du Pont, as a voluntary remediator, to obtain partial cost recovery because that provision was limited to joint and several liability claims for indemnity, whereas § 113(f) was the source of all partial cost recovery claims:

> [B]ecause § 107 imposes strict, joint and several liability on all PRPs for the costs of a cleanup, a PRP allowed to bring a cost recovery claim action under § 107 against another PRP 'could recoup all of its expenditures regardless of fault – which . . . strains logic.'

E. I. du Pont, 460 F.3d 521-22. Much like its pre-*Aviall* counterparts, the court totally ignored the fact that contribution is available only to jointly *liable* parties, one of

which is *compelled* to pay more than its fair share of that common liability. Also, as in many pre-*Aviall* cases, the court erroneously concluded that § 107(a)(4)(B) provides joint and several liability for indemnity only.

Finally, and most recently, the Seventh Circuit decided *Metropolitan Water, supra*. Like Consolidated Edison and ARC, Metropolitan Water was a voluntary remediator because no person other than Metropolitan Water had incurred any response costs at the site involved – no enforcement action had been undertaken. The court, as in *Con. Ed.* and *Atlantic Research*, expressly rejected the interpretation of § 107(a)(4)(B) proffered by the government here, *i.e.*, that "any other person" does not include PRPs, and adopted the reasoning in *Con. Ed.* and *Atlantic Research*, holding that voluntary remediators may seek partial cost recovery under § 107(a)(4)(B). The court observed that because Metropolitan Water had conducted the cleanup when no other party had taken remedial action, there was no common liability with any other PRP, an essential element of contribution: "Therefore, Metropolitan Water's action under § 107 is characterized more appropriately as a cost recovery action than as a claim for contribution." *Id.*, 473 F.3d at 836 n.17.

ARC submits that *Con. Ed.*, *Atlantic Research*, and *Metropolitan Water*, respectively, correctly concluded that voluntary remediators, such as ARC, may pursue § 107(a)(4)(B) cost recovery claims against other PRPs, such as the United States. While none of these cases specifically addressed the issue of joint and several liability, where the United States is a PRP subject to a § 107(a)(4)(B) action by a voluntary remediator, the United States' potential liability should be several only. The *Con. Ed.*, *Atlantic Research* and *Metropolitan Water* decisions

are consistent with the language of § 107(a)(4)(B) which, in this case, effectively provides that the United States is liable for a portion of the necessary costs of response incurred by ARC consistent with the NCP. The liability of the United States exists under § 107(a)(4)(B), not § 113(f), and is several only, permitting ARC to recover an equitable share of the cleanup costs it has incurred at the Camden, Arkansas site. To hold otherwise would effectively write § 107(a)(4)(B) out of CERCLA for those PRPs that voluntarily engage in site cleanup, and would virtually immunize the United States from assuming its fair share of responsibility for contaminating sites all over the country. Such a result is contrary to both the language and purposes of CERCLA.

III. ALTERNATIVELY, IF ARC IS NOT ENTITLED TO RECOVER A PORTION OF ITS RESPONSE COSTS UNDER § 107(a)(4)(B), IT IS ENTITLED TO SEEK RECOVERY PURSUANT TO AN IMPLIED RIGHT OF CONTRIBUTION AFFORDED BY § 107(a)(4)(B).

In the event that ARC is somehow deemed a "compelled remediator," precluding its right to maintain a partial cost recovery action against the United States under § 107(a)(4)(B), ARC submits that, as the Court of Appeals held below, it has an implied right to seek contribution under CERCLA, a right left undisturbed by the enactment of SARA in 1986. Significantly, the government does not dispute the fact that the savings clause in § 113(f)(1) "preserves the ability of a PRP to bring an action for contribution, (as that term is traditionally defined) . . . ," apart from § 113(f). (Gov't. Cert. Pet., pp. 19-20.) However, the government maintains that this

retained right to seek contribution is defined in its "traditional" sense:

> Even if § 107(a) did contain an implied right to contribution, moreover, it would not help respondent, because § 107(a) would at most contain an implied right to 'contribution' in its 'traditional' sense, *i.e.*, a claim by one party to recover an amount from a jointly liable party *after the first party had extinguished a disproportionate share of their common liability to a third party.*

(Gov't. Br., p. 23) (emphasis added). Because there has been no discharge of all liability at the Camden site, *i.e.*, cleanup is ongoing, the government claims that ARC may not recover contribution because "traditional" contribution principles preclude recovery. (Gov't. Br., pp. 11-12, 21-26.) The government is wrong.

Prior to the enactment of SARA, courts unanimously held that compelled remediators had an implied right to seek contribution from other PRPs based upon the legislative history underlying CERCLA, as well as the language in § 107(a)(4)(B) and § 107(e)(2). These courts concluded that, as Congress had expressly indicated, the nature and scope of a PRP's contribution rights were to be developed by the courts as a matter of CERCLA common law; CERCLA's common law of contribution allowed compelled remediators to recover contribution from other PRPs for response costs incurred.

Significantly, there was *no* requirement under CERCLA's common law of contribution requiring the contribution plaintiff to have discharged all of the liability of the contribution defendant, as would be required under "traditional" common law contribution principles. The reason was obvious; because the cost required for a given

PRP to completely clean up a contaminated site is often monumental, if not unattainable, contribution under CERCLA did not require a complete cleanup or discharge of all common liability at the site. *See, e.g., Shore Realty, supra*, 648 F. Supp. at 262. Indeed, this fact is evidenced by the EPA's own view of CERCLA contribution, which is quoted by the government at p. 25 of its brief:

> [I]n a guidance document issued shortly before the enactment of the express contribution provision in Section 113(f) . . . [EPA emphasized] 'contribution among responsible parties is based on the principle that a jointly and severally liable party who has paid all or *a portion of a judgment or settlement* may be entitled to reimbursement from other jointly or severally liable parties.'

Citing 50 Fed. Reg. 5038 (1985) (emphasis added).[18]

This CERCLA common law contribution principle was confirmed and codified in § 113(f)(3)(B), providing that where a compelled remediator has settled its liability with the United States or a State, the PRP may recover contribution from another PRP "for some or all of a response action or for some or all of the costs of such action" – that is, *regardless of whether cleanup has been completed.* Moreover, EPA has consistently taken pains to state that PRPs who clean up sites may recover a portion of their costs before completing those cleanups because "requiring a party to incur all costs before bringing a cost recovery action may discourage and delay cleanups, contrary to the

[18] Notably, contribution availability does not necessarily depend upon payment pursuant to a judgment or settlement, as the government claims, Gov't. Br., pp. 12, 25-26, but payment must be compelled. *See Centerior, supra*, 153 F.3d at 350-51.

intent of Congress that sites be cleaned up expeditiously." 55 Fed. Reg. 8666, 8798 (1990). Finally, the savings clause in § 113(f)(1) preserved not only traditional common law contribution claims that PRPs might have in the absence of a § 106 or § 107(a) action, but also those CERCLA common law contribution claims that existed prior to SARA, but were not asserted in or following a § 106 or § 107(a) civil action. As this Court observed in *Aviall*, 543 U.S. at 166-67:

> The sole function of [this] sentence is to clarify that § 113(f)(1) does nothing to 'diminish' any cause(s) of action for contribution that may exist independently of § 113(f)(1). In other words, the sentence rebuts any presumption that the express right of contribution provided by the enabling clause is the exclusive cause of action for contribution available to a PRP.

Accordingly, the enactment of SARA in 1986 did not withdraw the previously recognized right of compelled remediators to seek CERCLA contribution from other PRPs *if*, as here, the party seeking contribution had incurred response costs, even if those response costs did not result in a complete cleanup. However, if no response costs had been incurred, the only means of seeking contribution was via § 113(f)(1) or § 113(f)(3)(B), allowing the contribution claim to be maintained in the context of a § 106 or § 107(a) civil action, or after a settlement, regardless of whether the defendant PRP had incurred any response costs.[19] Each of these sources of contribution

[19] Pre-SARA courts, almost without exception, held that a PRP must have incurred response costs in order to seek contribution. *See Shore Realty, supra*, 648 F. Supp. at 261-62 (citing cases). Section 113(f)(1) permitted PRPs to assert contribution claims during or after

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rights are compatible and do not result in § 113(f) being superfluous. As the Court of Appeals held below:

> We must next ask whether, in enacting § 113, Congress intended to eliminate the preexisting right to contribution it had allowed for court development under § 107. We conclude it did not. The plain text of § 113 reflects no intent to eliminate other rights to contribution; . . . This view is further supported by examining § 113's legislative history reflecting Congress's intention to clarify and confirm, not to supplant or extinguish, the existing right to contribution. . . . We conclude therefore that if Congress intended § 113 to completely replace § 107 in all circumstances, even where a plaintiff was not eligible to use § 113, it would have done so explicitly. Accordingly, we consider the plain language of CERCLA to be consistent with an implied right to contribution for parties such as Atlantic.

459 F.3d at 836.

Because ARC has incurred response costs, it is entitled to seek CERCLA contribution from the United States, even though site cleanup is on-going, a right implied from § 107(a)(4)(B) and § 107(e)(2), and preserved by SARA. Therefore, ARC is entitled to proceed with its partial cost recovery claim against the United States even if, *arguendo*, ARC were not entitled to maintain its § 107(a)(4)(B) direct cost recovery action as a voluntary remediator under CERCLA.

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§ 106 and § 107(a) civil actions even if no response costs had been incurred, thereby *expanding* the CERCLA common law right to seek contribution. Compare Rule 14, Fed. R. Civ. P.

CONCLUSION

For each of the above reasons, ARC respectfully submits that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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4/13/07

No. 06-562

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC RESEARCH CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

According to respondent (Br. 4, 28), "all" potentially responsible parties (PRPs) can sue other PRPs for cost recovery under Section 107(a)(1)-(4)(B) of CERCLA. As the government has explained, however, that interpretation is inconsistent with the text and structure of Section 107(a). It would also render Section 113(f) essentially superfluous, negating Congress's decision to create an express and carefully delimited contribution remedy for PRPs, and frustrating Congress's clear intent to provide powerful incentives to *encourage* PRPs to settle voluntarily with the government and perform government-supervised cleanups.

Apparently recognizing the unacceptable anomalies created by its interpretation, respondent urges the Court to eliminate some of those difficulties by the simple expedient of devising an altogether different scheme from the one enacted by Congress. Thus, notwithstanding the established principle that Section 107(a) imposes joint and several liability on PRPs, respondent urges the Court to dispense with that principle when PRPs bring suit, and instead to fashion remedies that would effectively transform such PRP suits into actions for contribution—albeit ones brought by litigants who do not qualify as contribution plaintiffs under *either* the traditional understanding of contribution *or* the express terms of Section 113(f). Faced with the unpleasant fact that its interpretation would demolish the carefully crafted settlement bar that Congress erected in Section 113(f)(2), respondent offers the further antidote that the courts should simply conjure up a new, broader settlement bar that would apply to Section 107 actions as well. All of this legislative tinkering might be a reasonable proposal to Congress, but it is too much to ask of this Court. In effect, respondent invites this Court to authorize the wholesale rewriting of the remedial scheme enacted by Congress so as to overturn the result in *Cooper Industries,*

Inc. v. *Aviall Services, Inc.*, 543 U.S. 157 (2004), which invoked a straightforward application of the statutory text. The Court should apply the normal rules of statutory construction and reject respondent's invitation.

A. Section 107(a)(1)-(4)(B) Does Not Permit Responsible Parties To Sue For Cost Recovery

1. Section 107(a)(1)-(4)(B) provides that all persons in four enumerated categories (*i.e.*, PRPs) shall be liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan" (NCP). 42 U.S.C. 9607(a)(1)-(4)(B). The better reading of the phrase "any other person" is that it excludes the "persons" previously referred to in the same statutory sentence, *i.e.*, the PRPs that are the sentence's subject. The various textual arguments of respondent and its amici to the contrary are unavailing.

Respondent primarily contends (Br. 7-8) that Section 107(a)(1)-(4)(B) should be read in parallel with Section 107(a)(1)-(4)(A), and that, under that reading, the phrase "any other person" in Section 107(a)(1)-(4)(B) necessarily excludes only the persons who are entitled to bring suit under Section 107(a)(1)-(4)(A): *i.e.*, "the United States Government or a State or an Indian tribe." Such a reading would be possible (although not compelled) if Section 107(a)(1)-(4)(A) and (B) provided alternative causes of action for the recovery of the *same* costs, as respondent contends (Br. 11). But in fact Section 107(a)(1)-(4)(A) and (B) provide for recovery of *mutually exclusive* costs. While Section 107(a)(1)-(4)(A) permits recovery of "all costs of removal or remedial action * * * not inconsistent with the national contingency plan," 42 U.S.C. 9607(a)(1)-(4)(A), Section 107(a)(1)-(4)(B) permits recovery only of "any *other* necessary costs * * * consistent with the national contingency plan": *i.e.*, costs *other than* the costs of governmental entities described in Section 107(a)(1)-(4)(A).

42 U.S.C. 9607(a)(1)-(4)(B) (emphasis added). Because the "other necessary costs" language already precludes governmental entities from suing under Section 107(a)(1)-(4)(B), respondent's reading would render the word "other" in the phrase "any other person" entirely superfluous—in contravention of the rule that every word in a statute should be given some operative effect.[1]

Respondent acknowledges (Br. 10-11) that, while a prior version of the language that would become Section 107(a)(1)-(4) authorized "any person" to bring suit for "any other costs" besides those incurred by a governmental entity, see S. 1480, 96th Cong. § 4(a) (as reported, Nov. 18, 1980), a substitute bill replaced the phrase "any person" with "any *other* person." See S. 1480, 96th Cong. § 107(a)(1)-(4)(B) (as amended, Nov. 21, 1980) (emphasis added). Respondent and its amici, however, offer no explanation for that change, other than to characterize it as a "minor stylistic change" or "mere drafting edit[]." Lockheed Br. 17. But words have meaning, and "any other person" plainly does not mean the same thing as "any person." Because the prior version of the bill, by limiting recovery to "other" costs, already unambiguously prevented governmental entities from recovering under Section 107(a)(1)-(4)(B), there was no need for Congress to "clarify" that governmental entities could not recover under that provision. And while respondent correctly notes (Br. 11) that there was no discussion of that change in the legislative history,

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[1] Respondent notes (Br. 8) that, by permitting recovery of costs that are consistent with the NCP, rather than costs that are *not inconsistent* with the NCP, Section 107(a)(1)-(4)(B) has been read to place the burden on the *plaintiff* on the issue of consistency. That is true, but it does nothing to support respondent's view that "any *other* person" excludes only the governmental entities included in Section 107(a)(1)-(4)(A). Those entities could not have sued under Section 107(a)(1)-(4)(B) in any event—nor would they have any incentive to do so even if they could, given that it is more difficult to recover (and fewer costs are recoverable) under Section 107(a)(1)-(4)(B) than under Section 107(a)(1)-(4)(A).

that fact is neither dispositive, see, *e.g.*, *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 592 (1980), nor surprising, in light of the fact that the Senate passed the substitute bill on the Monday following the Friday on which it was introduced. See Pub. L. No. 96-510, 94 Stat. 2811. The history of Section 107(a)(1)-(4)(B) thus underscores that the inclusion of the word "other" was purposeful and confirms that the phrase "any other person" was intended to exclude PRPs, rather than (already excluded) governmental entities.

Contrary to respondent's contention (Br. 12), the "rule of the last antecedent" does not compel a different interpretation. As a preliminary matter, it is questionable whether that rule even applies here, because it provides only that an adjectival clause or phrase should be read to modify the noun that it immediately follows. See *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003). The adjective "other," by contrast, plainly modifies the noun that it precedes, "person," and the relevant question is thus not what the adjective "other" *modifies*, but instead to what it *refers* (and thereby excludes). Even assuming, however, that the rule could be relevant here, this Court has observed that the rule "is not an absolute and can assuredly be overcome by other indicia of meaning." *Ibid.* Here, in particular, the rule should not be read to trump the more fundamental rule against rendering statutory terms superfluous. Because the word "other" in the phrase "other necessary costs" already forecloses the possibility that the governmental entities enumerated in Section 107(a)(1)-(4)(A) could seek relief under Section 107(a)(1)-(4)(B), the *only* construction that gives meaning to the word "other" in the phrase "any other person" is one in which "other" refers to (and excludes) the PRPs listed earlier in Section 107(a)(1)-(4).

Respondent's amici contend that Section 107(a)(1)-(4)(B) should not be limited to suits by "innocent" private parties because the number of parties that would fall into that category would be "minuscule." See, *e.g.*, Consolidated Edison Br.

13. But even a modest role for a statutory provision is better than none at all (which is what respondent's view leaves the term "other"). Moreover, it is incontrovertible that Section 107(a)(1)-(4)(B) can be invoked by at least two important classes of private parties that would qualify as PRPs but for specific statutory exclusions: (1) parties that can show that the release of a hazardous substance was caused solely by the act or omission of a third party, see 42 U.S.C. 9601(35), 9607(b)(3); and (2) parties that can satisfy the statutory requirements for a "bona fide prospective purchaser," see 42 U.S.C. 9601(40), 9607(r)(1) (Supp. III 2003). Indeed, some of respondent's amici concede that they would usually be able to bring suit under the government's interpretation of Section 107(a)(1)-(4)(B). See ACWA Br. 16. When properly construed to permit only non-PRP private parties to bring suit, Section 107(a)(1)-(4)(B) thus has substantial operative effect.[2]

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[2] Respondent (Br. 5-6, 30) and its amici contend that the United States has taken conflicting positions concerning the availability of a cause of action for PRPs under Section 107(a)(1)-(4)(B). In reality, the United States has consistently maintained, in keeping with the unanimous view of the courts of appeals before this Court's decision in *Cooper Industries*, that Section 113(f) governs the procedures by which one PRP can sue another under CERCLA. See, *e.g.*, U.S. Br. at 21, *Cooper Industries*, *supra* (No. 02-1192) (stating that, "[w]hen read in combination, the clear implication of Section 107(a)(1)-(4)(B) and Section 113 is that the jointly liable party is limited to seeking contribution in the manner authorized by Section 113(f)"). In light of seemingly contrary suggestions in *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 818 & n.11 (1994), the United States did not specifically argue before this Court's decision in *Cooper Industries* that the plain text of Section 107(a)(1)-(4)(B) forecloses one PRP from bringing suit against another. Once *Cooper Industries* clarified that the suggestions in *Key Tronic* constituted dictum (see 543 U.S. at 170), however, the United States reexamined the statutory text and concluded that Section 107(a)(1)-(4)(B) does not confer a cause of action on PRPs. See, *e.g.*, U.S. Br. at 9-11, *Metropolitan Water Reclamation Dist.* v. *North Am. Galvanizing & Coatings, Inc.*, No. 05-3299, 2006 WL 1354188 (7th Cir. filed May 1, 2006).

2. All of the other arguments advanced by respondent and its amici in support of their construction of Section 107(a)(1)-(4)(B) also lack merit.

Respondent contends (Br. 20-21) that the phrase "any other person" in Section 107(a)(1)-(4)(B) should be construed as including PRPs because the same phrase appears, and is so construed, in Section 111(a). That provision specifies that the Hazardous Substances Superfund should be used for, *inter alia*, "[p]ayment of governmental response costs," 42 U.S.C. 9611(a)(1), and "[p]ayment of any other claim for necessary response costs incurred by *any other person*," subject to government authorization, 42 U.S.C. 9611(a)(2) (emphasis added). Section 111(a)(2), however, critically differs from Section 107(a)(1)-(4)(B) because the word "other" in the former provision must refer to the governmental entities that are implicitly mentioned in the previous paragraph; there is no other possible referent. The content of the term "other" obviously varies depending on the surrounding text and the universe of potential referents.[3]

Respondent relies (Br. 21-23) on regulations promulgated by EPA, but those regulations are consistent with the view that PRPs that cannot seek contribution under Section 113(f) have no remedy under Section 107(a)(1)-(4)(B). Indeed, the most relevant provision states that "[r]esponsible parties shall be liable for necessary costs of response actions * * * in-

[3] There is no incongruity in permitting PRPs to recover response costs from the Superfund while preventing them from bringing suit against other PRPs absent an underlying suit or settlement. Private parties can seek Superfund reimbursement only with respect to costs that have been "approved under [the NCP] and certified by the responsible Federal official," 42 U.S.C. 9611(a)(2), and the relevant regulation provides that the EPA may authorize a PRP's claim "only in accordance with an order issued pursuant to [S]ection 106 * * * or a settlement with the federal government in accordance with [S]ection 122." 40 C.F.R. 300.700(d)(5). Settling PRPs—including PRPs that enter into appropriate administrative consent orders with EPA under Section 106—would generally have the right to seek contribution under Section 113(f)(3)(B).

curred by any *other* person consistent with the NCP." 40 C.F.R. 300.700(c)(2) (emphasis added). The word "other" in the phrase "any other person" necessarily refers to (and thereby excludes) the "[r]esponsible parties" that are the subject of the sentence. While another provision, 40 C.F.R. 300.700(c)(3)(ii), states that a response action carried out in compliance with a Section 106 order or a Section 122 consent decree "will be considered 'consistent with the NCP'" for purposes of cost recovery under Section 107(a)(1)-(4)(B), it does not follow that PRPs that are ineligible for Section 113(f) relief can bring suit under Section 107(a)(1)-(4)(B). A private party can be subject to an administrative order under Section 106 even if it is not a PRP, see 42 U.S.C. 9606(b)(2)(C), and, in any event, to the extent that Section 107(a)(1)-(4)(B) imposes the underlying liability that is a necessary predicate for a contribution claim under Section 113(f),[4] the regulation simply makes clear that, when a PRP is entitled to obtain contribution for cost recovery pursuant to Section 113(f), it may recover any costs covered by that regulation without having to burden itself (and the courts) with the necessity of proving consistency with the NCP—often a costly, complex, and time-consuming matter that is best resolved through administrative expertise rather than the unnecessary expenditure of judicial resources.

Finally, respondent argues (Br. 26) that CERCLA was intended to "make those responsible for the contamination pay for the cleanups." It does not follow, however, that Con-

[4] Absent a discharge of liability by judgment or settlement with the government, PRPs *always* retain shared liability to the government for cleaning up (or paying for the cleanup) of their contaminated sites, regardless whether any private party has a cause of action under Section 107(a)(1)-(4)(B). See 42 U.S.C. 9606, 9607(a)(1)-(4)(A). Respondent thus errs in contending (Br. 2, 5-6) that PRPs have no CERCLA liability until another party has incurred response costs. Any PRP that has not discharged its liability to the government qualifies as a "person who is liable or potentially liable" under Section 106 or 107(a), and can therefore be sued under Section 113(f) by qualifying plaintiffs.

gress intended to permit any PRP to sue any other PRP for cost recovery at any time, even when the plaintiff has not yet resolved its own CERCLA liability. The government's reading of Section 107(a)(1)-(4)(B) fully effectuates CERCLA's purposes, and does so in an orderly fashion, by allowing government enforcement agencies to settle with (or take action against) PRPs before those PRPs can sue others for contribution, thereby encouraging settlements and supervised cleanups.

B. Respondent's Interpretation Cannot Account For Section 113(f), Which Provides The Exclusive Mechanisms By Which A Potentially Responsible Party Can Sue Another Under CERCLA

That *Cooper Industries* reserved the question in this case while construing Section 113(f) does not mean that Section 113(f) is irrelevant to the question here. To the contrary, that express statutory contribution provision fatally undermines the plausibility of respondent's proposed construction. Under respondent's reading, Section 113(f)'s interlocking remedial scheme for PRPs would be rendered largely superfluous, and Congress's goal of encouraging settlement with the government would be frustrated. The better view is that Section 113(f) provides the exclusive mechanisms by which one PRP can bring suit against another under CERCLA, and respondent's contrary arguments lack merit.

1. Respondent fails to come to grips with the established principle that, in the context of remedial statutes, "a precisely drawn, detailed statute pre-empts more general remedies." *Block* v. *North Dakota*, 461 U.S. 273, 285 (1983). It would have been peculiar if Congress, in enacting SARA, had supplied PRPs with an express cause of action for *contribution* (and explicitly addressed and resolved a variety of second-order issues such as the effect of settlement in those actions), but not a broader express cause of action for *cost recovery*, if

it intended to permit PRPs to pursue the latter (as well as the former) type of action.

Respondent repeatedly asserts (Br. 1, 16 n.8, 19, 23, 28, 29, 30, 43, 46) that lower courts have unanimously held that one PRP can bring suit against another for cost recovery under Section 107(a)(1)-(4)(B). Respondent thereby seemingly suggests that, because it was allegedly undisputed that one PRP could bring suit against another for cost recovery under Section 107(a)(1)-(4)(B) at the time Congress enacted SARA, Congress operated on that assumption, and left that right undisturbed, in providing an express cause of action only for *contribution* in Section 113(f). Respondent and its amici, however, utterly fail to identify the supposed plethora of cases in which lower courts held, *prior to Congress's enactment of SARA*, that one PRP could bring suit against another for cost recovery under Section 107(a)(1)-(4)(B). Instead, as previously noted (U.S. Br. 28), only a few district court cases had so held.[5]

On the other hand, at least one district court had concluded that a PRP did not have a right to cost recovery under Section 107(a)(1)-(4)(B). See *D'Imperio* v. *United States*, 575 F. Supp.

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[5] While respondent (Br. 10 nn.4 & 5) and its amici cite numerous cases, almost all of those cases are distinguishable on the grounds that (1) the case was decided *after* Congress enacted SARA in 1986 (and thus could not have informed Congress's understanding of Section 107(a)); (2) the court simply assumed, without analysis, that a PRP was entitled to bring suit under Section 107(a)(1)-(4)(B), see *Allied Towing Corp.* v. *Great Eastern Petroleum Corp.*, 642 F. Supp. 1339, 1348-1349 (E.D. Va. 1986); (3) it was unclear whether the plaintiff had first been sued or reached a settlement (and was therefore suing for contribution), see *Wickland Oil Terminals* v. *Asarco, Inc.*, 792 F.2d 887, 891 (9th Cir. 1986); (4) the plaintiff was or may have been an "innocent" party rather than a PRP, see *Walls* v. *Waste Res. Corp.*, 761 F.2d 311, 314 (6th Cir. 1985); *Artesian Water Co.* v. *Government of New Castle County*, 605 F. Supp. 1348, 1356-1357 (D. Del. 1985); *Jones* v. *Inmont*, 584 F. Supp. 1425, 1427 (S.D. Ohio 1984); or (5) the reference to PRP suits for cost recovery under Section 107(a)(1)-(4)(B) was mere dictum, see *United States* v. *New Castle County*, 642 F. Supp. 1258, 1262-1264 (D. Del. 1986).

248, 253 (D.N.J. 1983). Because it was far from settled that one PRP could sue another for cost recovery under Section 107(a)(1)-(4)(B) at the time Congress enacted SARA, the relevant question is not whether Congress impliedly repealed Section 107(a)(1)-(4)(B) by enacting Section 113(f). Instead, it is whether, when Section 107(a) and Section 113(f) are read together, the text of Section 113(f) suggests that a PRP is not entitled to bring suit under Section 107(a)(1)-(4)(B)—and the answer to that question is plainly yes. See *United States* v. *Estate of Romani*, 523 U.S. 517, 530 (1998); *United States* v. *Fausto*, 484 U.S. 439, 453 (1988).

The legislative history of SARA, moreover, supports the conclusion that Congress did not intend to permit a broader and amorphous implied cause of action for cost recovery to coexist with (and largely supplant) the narrow and carefully defined express cause of action for contribution that it supplied in SARA. Respondent does not so much as cite, much less explain, the report of the House Energy and Commerce Committee, which the United States emphasized in its opening brief (at 29). That report states that Section 113(f) "does not affect the right of the *United States* to maintain a cause of action for cost recovery under Section 107," without mentioning any corresponding "right" of private PRPs. H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. 1, at 79-80 (1985) (emphasis added). That legislative history indicates that, in enacting Section 113(f), Congress was operating on the assumption that a PRP could *not* pursue an action against another PRP for cost recovery under Section 107(a)(1)-(4)(B).

2. Respondent contends (Br. 4, 28) that "all" PRPs can sue other PRPs for cost recovery under Section 107(a)(1)-(4)(B). Under that view, of course, Section 113(f) is rendered entirely superfluous, because *any* PRP that paid response costs could sue directly under Section 107(a)(1)-(4)(B), regardless of whether it would qualify to bring a contribution action under Section 113(f). Respondent does not even attempt to justify

the absurd notion that Congress engaged in an entirely pointless and futile act in drafting Section 113(f) (and that this Court engaged in a similarly futile act in *Cooper Industries* in holding that the "during or following any civil action" limitation in Section 113(f)(1) means what it says).

At other points (*e.g.*, Br. 19), respondent seems to assume, as did the court of appeals (Pet. App. 17a), that only "voluntary remediators" could sue under Section 107(a)(1)-(4)(B), and that PRPs that made the mistake of settling with the government would be relegated to the contribution remedy provided by Section 113(f). Respondent does not, however, attempt to justify that atextual limitation on suits under Section 107(a)(1)-(4)(B), which is patently inconsistent with respondent's reading of the "any other person" phrase. For their part, respondent's amici concede that, in order to adopt that limitation, this Court would have to "create an implied exception in [Section 107(a)(1)-(4)(B)]." NRDC Br. 21 n.26.[6] Even if the Court were to engage in such radical statutory surgery, however, it would not cure the fundamental infirmity with the court of appeals' reading: *i.e.*, that a PRP could always circumvent Section 113(f)'s requirement of a pending or completed Section 106 or 107(a) action simply by bringing suit under Section 107(a)(1)-(4)(B).

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[6] In an effort to obviate the need to "create an implied exception," NRDC suggests that, at the time Congress enacted SARA, it was "at best ambiguous" whether Section 107(a)(1)-(4)(B) conferred a right to contribution, even though Section 107(a)(1)-(4)(B) "unambiguously provided * * * a right [to cost recovery] to those who engaged in voluntary cleanups." Br. 20. Because contribution is merely a form of cost recovery (and, indeed, the form with firmer common law roots), however, and because the purportedly sweeping preexisting cause of action for cost recovery would (if it had in fact existed) have obviated any need to supply the narrower contribution remedy enacted in Section 113(f), it could not have been clear before SARA's enactment that one PRP could bring suit against another under Section 107(a)(1)-(4)(B) for cost recovery, yet simultaneously unclear whether one PRP could bring suit against another under Section 107(a)(1)-(4)(B) for contribution.

3. Finally, respondent apparently concedes (Br. 48) that, at least to the extent that it is deemed a "voluntary" rather than "compelled" remediator, its claim does not qualify as a claim for "contribution" that could be saved by the savings clause in Section 113(f)(1). Respondent is correct to make that apparent concession, because the savings clause merely preserves the ability of a PRP to bring an action for contribution (as that concept is traditionally defined) under any other provision of law, including state law. See 42 U.S.C. 9613(f)(1). The savings clause does not purport to "save" any supposed cause of action for PRPs under Section 107(a)(1)-(4)(B), as it would have done if Congress had intended PRPs to have such a remedy.

C. Section 107(a) Does Not Create An Implied Right To Contribution Separate And Apart From The Explicit Contribution Remedy Set Forth In Section 113(f)

Respondent makes no serious effort to defend the court of appeals' alternative holding that Section 107(a) contains an implied right to contribution, distinct from the cause of action for cost recovery contained in Section 107(a)(1)-(4)(B). Pet. App. 15a. In particular, respondent offers no response to the argument that Section 107(a) is best read as not giving rise to an implied right to contribution at all. Nor does respondent refute the point that any implied right of contribution would, at most, authorize contribution in its traditional sense.

Instead, respondent contends (Br. 45) only that, "[i]n the event that [it] is somehow deemed a 'compelled remediator,'" it should be entitled to avail itself of an implied right to contribution. Even assuming that Section 107(a) contained an implied right to contribution, however, the relevant question would not be whether a PRP had incurred cleanup costs under some form of "compulsion"—or, as respondent alternatively suggests (Br. 48), whether the PRP's actions "result[ed] in a complete cleanup"—but rather whether the PRP had extin-

guished its common liability to a third party through suit or settlement. Respondent does not explain how it could qualify to seek contribution notwithstanding the fact that it has indisputably not been subject to suit (or reached a settlement) with regard to the costs it seeks to recover. As a result, respondent cannot avail itself of any implied right to contribution under Section 107(a).

D. The Structure And Purpose Of CERCLA And SARA Do Not Permit A Potentially Responsible Party To Sue Another Potentially Responsible Party To Recover Cleanup Costs

Respondent offers no valid response to the argument that its reading of Section 107(a)(1)-(4)(B) would undermine Congress's goals, in enacting CERCLA and SARA, of promoting government-supervised cleanups and encouraging PRPs promptly to settle with the government.

1. Respondent disputes the proposition (Br. 39) that, under its reading of Section 107(a)(1)-(4)(B), a PRP that has not yet been sued under Section 106 or 107(a) may have incentives not to settle with the government, in order to preserve its right to sue other PRPs under the substantially more generous provisions of Section 107(a)(1)-(4)(B) rather than Section 113(f). Respondent's arguments lack merit.

First, notwithstanding the settled principle that Section 107(a) imposes joint and several liability on PRPs (in keeping with its plain text, which makes PRPs liable for "*any*" qualifying response costs), respondent contends (Br. 7) that, when (but only when) a PRP is the plaintiff, Section 107(a) should instead "impose several liability only, just as in the contribution remedy provided by § 113(f)." Respondent offers no textual basis for that inconsistent treatment, which has seemingly been rejected even by courts that have adopted respondent's reading of Section 107(a)(1)-(4)(B). See Pet. App. 15a; *Consolidated Edison Co. of New York, Inc.* v. *UGI Utils.*,

Inc., 423 F.3d 90, 100 n.9 (2d Cir. 2005), petition for cert. pending, No. 05-1323 (filed Apr. 14, 2006). Under the approach favored by those courts, however, a PRP could sue another PRP for joint and several liability, thereby placing the burden on the defendant PRP to pursue (and prove) a counterclaim against the plaintiff PRP simply in order to avoid paying for the plaintiff PRP's share of the costs.

In any event, it is uncertain whether even respondent's approach would entirely eliminate the burden on defendant PRPs, because a defendant PRP might still be required to pursue third-party claims for contribution against other PRPs in order to avoid paying for *their* shares. By proposing an atextual limitation on a PRP suit for cost recovery under Section 107(a)(1)-(4)(B) comparable to the textual limitation that Congress did impose on a PRP suit for contribution under Section 113(f), respondent makes clear that it seeks nothing less than to circumvent Section 113(f)'s requirement of a pending or completed Section 106 or 107(a) action through the simple expedient of bringing an action under Section 107(a)(1)-(4)(B). Respondent cannot simply borrow the subsidiary aspects of Section 113(f) in order to make its Section 107(a) action workable without also borrowing the major limitation of Section 113(f), which makes clear that respondent has no viable action. Cf. *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 125 (2005) (rejecting attempt to "borrow" only statute of limitations, but not other limitations, of a specific statutory cause of action).

Second, respondent claims (Br. 31) that PRPs permitted to sue under Section 107(a)(1)-(4)(B) would not receive a potentially more favorable limitation period, because actions for "first instance response costs" are never subject to the three-year limitation period for actions for contribution in Section 113(g)(3), even when asserted by a contribution plaintiff. Respondent is mistaken. Contribution is available for "first instance" response costs, see 42 U.S.C. 9613(f)(3)(B); *United*

Techs. Corp. v. *Browning-Ferris Indus.*, 33 F.3d 96, 101-102 (1st Cir. 1994), cert. denied, 513 U.S. 1183 (1995), and Section 113(g)(3) provides that "[n]o action for contribution for *any response costs*" may be brought outside the three-year limitation period. 42 U.S.C. 9613(g)(3) (emphasis added). Thus, *all* contribution claims are subject to the three-year limitation period, whereas PRPs, if permitted to sue under Section 107(a)(1)-(4)(B), could avail themselves of the potentially more generous limitation period for cost-recovery claims.

Third, respondent suggests (Br. 38) that, when one PRP sues another for cost recovery under Section 107(a)(1)-(4)(B), a court could, "where appropriate," prohibit the plaintiff PRP from recovering where the defendant PRP had itself reached a settlement with the government. It is indisputable, however, that the settlement bar enacted by Congress in SARA provides protection only against actions for "contribution," not actions for cost recovery. 42 U.S.C. 9613(f)(2).[7] In proposing (Br. 38) that courts ignore the *expressio unius* principle and create out of thin air a parallel settlement bar that would miraculously extend to cost-recovery actions "precisely the same settlement protection" afforded to contribution actions by Section 113(f)(2), respondent once again seeks to borrow complementary parts of Section 113(f) while ignoring

[7] Amicus Lockheed contends (Br. 25-26) that, because the settlement bar in Section 113(f)(2) provides protection only against "claims for contribution *regarding matters addressed in the settlement*," 42 U.S.C. 9613(f)(2) (emphasis added), it protects only against claims by PRPs that have reimbursed some portion of the *government's* costs and not against claims by PRPs that incurred response costs of their own. As respondent seemingly recognizes (Br. 37), however, whether an action for cost recovery implicates "matters addressed in the settlement" turns on the terms of the settlement agreement itself, and courts have upheld settlement agreements that protect settling defendants from contribution claims for response actions being performed by other PRPs. See, *e.g.*, *United States* v. *BP Amoco Oil PLC*, 277 F.3d 1012, 1015, 1020-1021 (8th Cir.), cert. denied, 537 U.S. 942 (2002); *United States* v. *Davis*, 261 F.3d 1, 27-28 (1st Cir. 2001); *United States* v. *Southeastern Pa. Transp. Auth.*, 235 F.3d 817, 822-823 (3d Cir. 2000).

its major limitation. Statutory construction simply does not work that way. Respondent's effort merely confirms that allowing private PRPs to pursue actions against settling PRPs would create incentives not only for would-be plaintiff PRPs not to settle with the government (so as to preserve their right to sue settling PRPs), but also for would-be defendant PRPs not to settle (because a settling PRP could still be sued by another PRP).[8]

The Court should see respondent's proposed statutory rewrites for what they are: *viz.*, an effort to create a shadow contribution scheme under Section 107(a)(1)-(4)(B) for PRPs that cannot satisfy Section 113(f)'s suit-or-settlement requirement. "There is no reason why Congress would bother to specify conditions under which a person may bring a contribution claim, and at the same time allow [the precise equivalent of] contribution actions absent those conditions." *Cooper Industries*, 543 U.S. at 166.

2. Respondent and its amici suggest that, in enacting CERCLA and SARA, Congress intended to encourage voluntary cleanups of contaminated sites. That is undoubtedly true, but it does not follow that Congress intended to promote unsupervised cleanups *at the expense of* government-supervised cleanups pursuant to settlement or suit. Indeed, the legislative history on which they rely actually confirms that Congress sought to encourage voluntary cleanups pursuant to settlements with the government. Thus, respondent cites (Br. 26) Senator Domenici's statement concerning the importance of encouraging "voluntary cleanup actions," 131 Cong. Rec. 24,730 (1985), but omits the very next sentence, which makes clear that he was referring to voluntary *settlement agree-*

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[8] As a theoretical matter, of course, settling PRPs remain subject to actions for cost recovery by "innocent" private parties under Section 107(a)(1)-(4)(B) and by non-settling sovereigns under Section 107(a)(1)-(4)(A). In practice, however, the prospect of such actions is likely to be a much smaller deterrent to settlement than the prospect of actions by other PRPs.

ments with the government. See *id.* at 24,731 (explaining that, "[u]nder [SARA], the President would be authorized to enter into agreements with potentially responsible parties to conduct remedial actions"). Similarly, amici Browner et al. cite (Br. 6) Representative Lent's reference to "a key groundbreaking structural reform [in SARA] that will encourage responsible parties to come forward and take responsibility for cleaning up the toxic waste sites they helped create," 131 Cong. Rec. 16,573 (1985), but omit the very next sentence, which makes clear that the "reform" at issue was designed to encourage *settlements* with the government. See *ibid.* (noting that, "[i]n this bill, we have provided the EPA administrator with additional authority to expedite settlements * * * so that responsible parties will no longer 'hide in the weeds' and avoid their responsibility to safeguard the public health and safety").

SARA was no doubt motivated by concerns that PRPs were resisting EPA's cleanup demands, necessitating costly and time-consuming litigation. But Congress addressed that concern by creating incentives for PRPs to enter into settlements with the government. There is no evidence in the legislative history of either CERCLA or SARA that suggests that Congress intended to allow PRPs to bring suit under Section 107(a) despite the very real danger that such suits would undermine the government-enforcement and settlement regime established by those statutes.

3. Private PRPs retain considerable incentives to engage in cleanups notwithstanding their inability to sue under Section 107(a). See U.S. Br. 43. And where a private PRP incurs substantial response costs and then enters into a settlement with the federal or state government (and where the PRP can identify other solvent PRPs with respect to the same facility), the PRP will generally be able to recover an allocated share of its costs by bringing an action for contribution under Section 113(f)(3)(B).

Respondent's amici suggest that, where EPA compels a PRP to undertake a response action by means of an administrative order under Section 106, the PRP would be unable to seek contribution from other PRPs, because the administrative order would not constitute a "civil action" for purposes of Section 113(f)(1). But a PRP threatened with issuance of a Section 106 order has two options, either of which may entitle it to seek contribution. If the PRP has no objection to the proposed response action, it can agree with EPA to enter into a consent order, and EPA has indicated that it will generally include language in such an order that would render it a "settlement" for purposes of Section 113(f)(3)(B).[9] On the other hand, if the PRP objects to the order, it can refuse to comply, whereupon the United States could bring suit under Section 106(b)(1) or Section 107(a)(1)-(4)(A) (and thereby trigger the right to seek contribution under Section 113(f)(1)).

Amicus Consolidated Edison also suggests (Br. 4-5) that, under the government's interpretation of Section 107(a)(1)-(4)(B), a PRP would have no incentive to settle with a State, because the State would somehow be disabled from entering into a qualifying settlement under Section 113(f)(3)(B). It is hard to see why that is so. While there are various open questions concerning precisely what a State must do in order to enter into a qualifying settlement, a State *could* do so by, at a minimum, making clear in the settlement that it was releasing its claim for response costs under CERCLA. Notably, the amici States do not embrace Consolidated Edison's view, but instead complain only that they would have to divert their attention from other cleanups upon receiving requests to enter into settlements at other sites. See States Br. 26-28. That

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[9] See Memorandum from Susan E. Bromm, Director, Office of Site Remediation Enforcement, EPA, and Bruce S. Gelber, Chief, Environmental Enforcement Section, Environment and Natural Resources Division, Department of Justice at 2 (Aug. 3, 2005) <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-rev-aoc-mod-mem.pdf>.

concern is overstated, however, given that States can and do require parties to reimburse the administrative costs incurred by States in entering into settlements. Moreover, many States have established EPA-approved voluntary cleanup programs in which they commit to ensure that such cleanups will be conducted in accordance with federal law. See EPA, *Memoranda of Agreement (MOAs) on State Voluntary Cleanup Programs (VCPs)* (Dec. 22, 2006) <www.epa.gov/brownfields/html-doc/statemoa.htm>. There is no obvious reason why States could not enter into settlement agreements with private parties that satisfy the terms of those programs.

Wholly apart from any incentives to settle in order to trigger a federal contribution remedy, PRPs also have powerful incentives to settle with States because virtually all States can also pursue PRPs under state law (which often enables PRPs to obtain contribution from other PRPs as well). See, *e.g.*, Environmental Law Institute, *An Analysis of State Superfund Programs: 50 State Study* 7-9, 31-35, 53-57, 139-279 (1998) (listing state statutes) <www.elistore.org/reports_detail.asp?ID=436>; Ark. Code Ann. §§ 8-7-501 *et seq.* (2000). Thus, the government's interpretation of Section 107(a)(1)-(4)(B) leaves PRPs with considerable incentive and opportunity to enter into settlements with States, and to engage in cleanups more generally.

4. Finally, respondent renews the contention (Br. 26-27) that, when federal PRPs are subject to liability, EPA would forgo enforcement action (and thus insulate those PRPs from liability for contribution). Respondent, however, does not dispute the proposition that EPA has repeatedly taken enforcement action in those circumstances.[10] Respondent's

[10] Respondent's amici contend that the government broke off settlement negotiations in this case and in *E.I. du Pont de Nemours & Co.* v. *United States*, 460 F.3d 515 (3d Cir. 2006), petition for cert. pending, No. 06-726 (filed Nov. 21, 2006), in the wake of this Court's decision in *Cooper Industries*. But the plaintiff PRPs were not negotiating with EPA to resolve their own cleanup liability; rather, they were merely seeking monetary relief from federal PRPs.

amici unwittingly confirm that proposition when they cite statements by EPA officials indicating their commitment to ensuring that the government abides by its obligations under CERCLA. See Browner Br. 16-17. Although the United States does not bring actions against itself in federal court, it routinely exposes itself to liability by pursuing enforcement action against private PRPs, and can also be subjected to liability when state or tribal authorities or "innocent" private parties take action themselves against PRPs.

The government's waiver of sovereign immunity in Section 120(a)(1) likewise provides no support for respondent's position. That waiver merely imposes liability on federal PRPs "to the same extent" as private parties; it does not define the class of permissible plaintiffs under Section 107(a) (or, for that matter, any other provision of CERCLA). The argument that SARA's waiver of sovereign immunity justifies reading into Section 107(a) a broad right of cost recovery against governmental and private PRPs alike is thus a non sequitur. Like all of the other policy arguments advanced by respondent and its amici, it should be rejected with leave to renew it before Congress, to which it is more properly directed.

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

APRIL 2007

Any "refusal" by the government to settle on those terms was understandable in light of the fact that, in the government's view, the plaintiff PRPs have no cause of action absent resolution of their own liability.

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Supreme Court, U.S.
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(4)

No. 06-562

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC RESEARCH CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether a party that is potentially responsible for the cost of cleaning up property contaminated with hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, but that does not satisfy the requirements for bringing an action for contribution under Section 113(f) of CERCLA, 42 U.S.C. 9613(f), may bring an action against another potentially responsible party for cost recovery under Section 107(a), 42 U.S.C. 9607(a).

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In the Supreme Court of the United States

No. 06-562

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v.

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ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 459 F.3d 827. The order and opinion of the district court (Pet. App. 20a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2006. The petition for a writ of certiorari was filed on October 24, 2006, and granted on January 19, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of Sections 101, 106, 107, and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601, 9606, 9607, and 9613, are set forth in an appendix to this brief.

STATEMENT

The question presented in this case is whether a party that is potentially responsible for the cleanup of property contaminated by hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, but is not eligible to bring an action for contribution under Section 113(f) of CERCLA, 42 U.S.C. 9613(f), may nevertheless bring an action against another potentially responsible party for cost recovery under Section 107(a), 42 U.S.C. 9607(a). Respondent sued the United States in the United States District Court for the District of Arkansas, seeking to recover expenses that respondent had incurred in cleaning up property that it had leased and used for retrofitting rocket motors under contract with the government. The district court dismissed respondent's claim under Section 107(a), ruling that respondent, as a potentially responsible party, was not entitled to bring suit under that provision. Pet. App. 20a-28a. The court of appeals reversed. *Id.* at 1a-19a.

A. The CERCLA Liability Scheme

1. Congress enacted CERCLA in 1980 in response to the serious environmental and health dangers posed by property contaminated by hazardous substances. *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). The "two goals" of CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, are "to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened" and "to hold responsible parties liable for the costs of these clean-ups." H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 3, at 15 (1985).

CERCLA "grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). The President has delegated most of his authority under CERCLA to the Environmental Protection Agency (EPA). See Exec. Order No. 12,580, 3 C.F.R. 193 (1988). CERCLA provides EPA with two primary mechanisms for cleaning up contaminated property. First, Section 104 of CERCLA authorizes EPA to undertake a "response action" (*i.e.*, a "removal action" or a "remedial action"), using monies from the Hazardous Substances Superfund. See 42 U.S.C. 9604; *Bestfoods*, 524 U.S. at 55. Second, Section 106 of CERCLA authorizes EPA to compel, by means of an administrative order or a request for judicial relief, a private party to undertake a response action, which EPA then monitors. 42 U.S.C. 9606.[1]

2. This case concerns Section 107(a) of CERCLA, which imposes liability for response costs on four categories of "[c]overed persons"—typically known as potentially responsible parties (PRPs). 42 U.S.C. 9607(a). PRPs are defined as (1) owners and operators of facilities at which hazardous substances are located; (2) past owners and operators of such facilities at the time that disposal of hazardous substances occurred; (3) persons who arranged for disposal or treatment of hazardous

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[1] Section 122(a), added to CERCLA by SARA, authorizes EPA to enter into an agreement with a private party to perform a response action if EPA "determines that such action will be done properly by such person." 42 U.S.C. 9622(a). Section 122(d), also added by SARA, provides that, when EPA enters into an agreement with a private party with respect to remedial action under Section 106, the agreement ordinarily shall be entered in the appropriate United States district court as a consent decree. 42 U.S.C. 9622(d); see 42 U.S.C. 9622(g) and (h).

substances; and (4) certain transporters of hazardous substances. See 42 U.S.C. 9607(a)(1)-(4). Congress has defined the pertinent statutory terms to reach a wide range of entities. See CERCLA § 101(9), (14), (20)-(22), (26) and (29), 42 U.S.C. 9601(9), (14), (20)-(22), (26) and (29); see also *Bestfoods*, 524 U.S. at 56 n.1 (noting that "[t]he remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup") (quoting *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 21 (1989) (plurality opinion)).

Under Section 107(a)(1)-(4)(A), persons who qualify as PRPs are liable for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan." 42 U.S.C. 9607(a)(1)-(4)(A).[2] Since the enactment of CERCLA, courts have consistently held that this language authorizes the enumerated governmental entities to bring suit against PRPs to recover their response costs, and to proceed on a theory of joint and several liability (except to the extent that PRPs can show that the alleged harm is divisible). See, *e.g.*, *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1121 (3d Cir. 1997).[3]

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[2] The national contingency plan consists of regulations prescribing the procedure for conducting cleanups under CERCLA and other federal laws. See CERCLA § 105, 42 U.S.C. 9605; 40 C.F.R. Pt. 300.

[3] At a substantial number of contaminated sites, States have primary responsibility for cleanup or monitoring. States may seek to recover their costs through actions under Section 107(a)(1)-(4)(A), and may also undertake cleanups and seek to recover their costs under any applicable state law. See, *e.g.*, Tex. Health & Safety Code Ann. §§ 361.181 *et seq.* (Vernon 2001 & Supp. 2006).

Under Section 107(a)(1)-(4)(B), persons who qualify as PRPs are also liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. 9607(a)(1)-(4)(B). In the immediate aftermath of CERCLA's enactment, lower courts disagreed on whether one PRP could bring suit against another PRP, what types of costs a PRP could recover in such an action, and whether Section 107(a)(1)-(4)(B) constituted the source of such a cause of action. Compare, *e.g.*, *City of Philadelphia* v. *Stepan Chem. Co.*, 544 F. Supp. 1135, 1140-1143 (E.D. Pa. 1982) (holding that PRP had right to cost recovery under Section 107(a)(1)-(4)(B)), and *United States* v. *New Castle County*, 642 F. Supp. 1258, 1261-1269 (D. Del. 1986) (holding that PRP had right to contribution under federal common law), with *United States* v. *Westinghouse Elec. Corp.*, No. IP 83-9-C, 1983 WL 160587, at *3-*4 (S.D. Ind. June 29, 1983) (holding that PRP had no right to contribution).

3. With the enactment of SARA in 1986, Congress added Section 113(f), which expressly supplies one PRP with a cause of action against another PRP in two specified circumstances. First, Section 113(f)(1) provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [Section 107(a)], during or following any civil action under [Section 106] or under [Section 107(a)]." 42 U.S.C. 9613(f)(1). Second, Section 113(f)(3)(B) provides that "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement referred to in [Section 113(f)(2)]." 42 U.S.C.

9613(f)(3)(B).[4] After SARA's enactment, numerous courts of appeals held that Section 113(f) provided the exclusive mechanisms by which one PRP could bring suit against another—and that a PRP thus could not sue another for cost recovery, on a theory of joint and several liability, under Section 107(a).[5]

4. In *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004), this Court held that, in order to bring suit against another PRP for contribution under Section 113(f)(1), a PRP must first be sued itself under either Section 106 or Section 107(a). See *id.* at 165-168. The Court left open the question presented here—namely, whether one PRP could sue another for cost recovery under Section 107(a), see *id.* at 168-170—but it noted the "numerous decisions of the Courts of Appeals * * * holding that a private party that is itself a PRP

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[4] Section 113(f)(2) provides that "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. 9613(f)(2).

[5] See, *e.g.*, *Bedford Affiliates* v. *Sills*, 156 F.3d 416, 423-425 (2d Cir. 1998); *Centerior Service Co.* v. *Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998); *Pneumo Abex Corp.* v. *High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 776 (4th Cir.), cert. denied, 525 U.S. 963 (1998); *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); *New Castle County*, 111 F.3d at 1121-1124; *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *Control Data Corp.* v. *S.C.S.C. Corp.*, 53 F.3d 930, 935 (8th Cir. 1995); *United States* v. *Colorado & E. R.R.*, 50 F.3d 1530, 1534-1536 (10th Cir. 1995); *United Technologies Corp.* v. *Browning-Ferris Indus.*, 33 F.3d 96, 100 (1st Cir. 1994), cert. denied, 513 U.S. 1183 (1995); *Akzo Coatings, Inc.* v. *Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

may not pursue a § 107(a) action against other PRPs for joint and several liability." *Id.* at 169.[6]

B. The Facts and Proceedings Below

1. As alleged in the complaint, respondent leased property in an industrial park in Camden, Arkansas, from approximately 1979 to 2003. From 1981 to 1986, respondent retrofitted rocket motors under contract with the United States. In doing so, respondent used a high-pressure water-spray system to remove propellant from the motors. Wastewater containing the propellant contaminated soil and groundwater at the site. Respondent also burned quantities of propellant, further contaminating the soil and groundwater. Respondent addressed the contamination without EPA supervision, incurring various cleanup costs. J.A. 10-13.

2. In 2002, respondent filed suit against the United States in the Western District of Arkansas, contending that the United States was a potentially responsible party for purposes of CERCLA (as an owner or operator

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[6] In 2002, Congress enacted the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (Brownfields Act). The Brownfields Act encourages cleanup and reuse of contaminated property by expanding protection from CERCLA liability in certain circumstances, see CERCLA § 107(*o*)-(r), 42 U.S.C. 9607(*o*)-(r) (Supp. III 2003), and authorizing EPA to establish and administer grant programs for site assessment and reuse, see CERCLA §§ 104(k), 128(a), 42 U.S.C. 9604(k), 9628(a) (Supp. III 2003). The Brownfields Act also places heightened reliance on state response programs by, for example, restricting the ability of the federal government to take enforcement action when "a person is conducting or has completed a response action * * * that is in compliance with the State program that specifically governs response actions for the protection of public health and the environment." CERCLA § 128(b)(1)(A)(ii), 42 U.S.C. 9628(b)(1)(A)(ii) (Supp. III 2003). Those statutory provisions are not at issue in this case.

of the Camden facility or a person who arranged for disposal or treatment of hazardous substances) and bringing claims for cost recovery under Section 107(a) and contribution under Section 113(f)(1). In the wake of this Court's decision in *Cooper Industries*, respondent amended its complaint to drop its Section 113(f)(1) claim. J.A. 34-37. The government then moved to dismiss the amended complaint for failure to state a claim on the ground that, because respondent was a PRP, it was not entitled to bring suit under Section 107(a). J.A. 38-41.

The district court granted the motion to dismiss. Pet. App. 21a-28a. Relying on an Eighth Circuit decision that preceded *Cooper Industries*, the district court concluded that "a party that is subject to CERCLA liability is limited to seeking contribution from other jointly liable parties in accordance with Section 113(f), unless the PRP qualifies for one of three defenses." *Id.* at 25a. The court rejected respondent's contention that *Cooper Industries* had "undermined the fundamental support for [the Eighth Circuit's decision] and other circuits' decisions that Section 113(f) limits PRPs' claims for contribution and precludes actions between PRPs for direct recovery under Section 107(a)." *Id.* at 26a.

3. The court of appeals reversed. Pet. App. 1a-19a. The court noted that, while *Cooper Industries* had left open the question whether a PRP could proceed under Section 107(a), it had indicated that Sections 107(a) and 113(f) provided "distinct" remedies. *Id.* at 13a. Accordingly, the court reasoned, "it is no longer appropriate to view § 107's remedies exclusively through a § 113 prism." *Id.* at 13a-14a. The court thus concluded that, in light of *Cooper Industries*, it was free to revisit the

availability of a cause of action under Section 107(a). *Id.* at 14a.

The court of appeals proceeded to hold that Section 107(a)(1)-(4)(B) provided a PRP with a right of cost recovery against another PRP. Pet. App. 14a-15a. The court "reject[ed] an approach which categorically deprives a liable party of a § 107 remedy," on the ground that there was "no such limitation in Congress's words." *Id.* at 14a. Reasoning that "'any other person' means any person other than the statutorily enumerated 'United States Government or a State or an Indian tribe'" and that respondent "is such a 'person,'" the court concluded that "[o]n its face § 107 applies." *Ibid.* The court recognized that "§ 107 allows 100% cost recovery"—*i.e.*, that Section 107(a) allows for cost recovery on a theory of joint and several liability. *Ibid.* But the court asserted that, "[i]f a plaintiff attempted to use § 107 to recover more than its fair share of reimbursement, a defendant would be free to counterclaim for contribution under § 113(f)." *Id.* at 15a. The court noted, without elaboration, that the right to bring suit under Section 107(a)(1)-(4)(B) "is available to parties who have incurred necessary costs of response, but have neither been sued nor settled their liability under §§ 106 or 107." *Id.* at 14a; see *id.* at 17a (asserting that "liable parties which have been subject to §§ 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continued vitality").

The court of appeals held, in the alternative, that "a right to contribution may be fairly implied" from Section 107(a). Pet. App. 15a. "Unlike some other statutes," the court reasoned, "CERCLA reflects Congress's unmistakable intent to create a private right of contribution." *Ibid.* The court explained that, "[a]t first, Congress left

some CERCLA liability issues, such as joint-and-several liability and contribution, to be developed by the federal courts under traditional and evolving principles of common law." *Id.* at 16a (internal quotation marks and citation omitted). The court rejected the argument that, "in enacting § 113, Congress intended to eliminate the pre-existing right to contribution it had allowed for court development under § 107." *Ibid.* The court noted that Section 113(f) contained a savings clause for other contribution actions and that the legislative history "reflect[ed] Congress's intention to clarify and confirm, not to supplant or extinguish, the existing right to contribution." *Ibid.* The court concluded that, "if Congress intended § 113 to completely replace § 107 in all circumstances, even where a plaintiff was not eligible to use § 113, it would have done so explicitly." *Id.* at 16a-17a.[7]

In the court of appeals' view, the opposite holding not only would be "contrary to CERCLA's purpose," but would "result[] in an absurd and unjust outcome." Pet. App. 18a. The court reasoned that, while the United States is often a potentially responsible party itself, "[i]t is, simultaneously, CERCLA's primary enforcer." *Ibid.* Under a contrary reading of Section 107(a), the court suggested, "the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle." *Ibid.* Congress, the court concluded, "did not create a loophole by which the Republic could escape its own CERCLA liability by perversely abandoning its CERCLA enforcement power." *Id.* at 19a.

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[7] The court of appeals reserved the question whether federal common law likewise supplied a right to contribution. Pet. App. 17a n.9.

SUMMARY OF ARGUMENT

The court of appeals erred in this case by holding that, under CERCLA, a potentially responsible party (PRP) that is not eligible to bring an action for contribution under Section 113(f) may nevertheless bring an action against another PRP for cost recovery under Section 107(a).

A. Section 107(a)(1)-(4)(B) of CERCLA does not authorize one PRP to bring an action against another PRP for cost recovery. Section 107(a)(1)-(4)(B) provides that PRPs shall be liable for certain government-incurred costs and for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." The most natural reading of the phrase "any other person" is that the word "other" refers to, and thereby excludes, the "persons" that are the subject of the sentence: *i.e.*, PRPs. Section 107(a)(1)-(4)(B) thus supplies a cause of action only for "innocent" private parties, such as neighboring landowners or bona fide purchasers, that incur the requisite costs in cleaning up contaminated property. There is no warrant for construing what this Court has described as an implied cause of action in Section 107(a)(1)-(4)(B) more broadly. That interpretation is consistent with the legislative history of Section 107(a)(1)-(4)(B), and the broader reading proposed by the court of appeals—which would allow any person aside from certain enumerated governmental entities to bring suit—would render the phrase "any other person" entirely superfluous.

B. Section 107(a) should not be read to contain an implied right to contribution, distinct from the cause of action for cost recovery contained in Section 107(a)(1)-(4)(B). Congress considered, but ultimately did not

adopt, an express contribution provision when it enacted CERCLA, strongly suggesting that no implied right to contribution was intended. Even if Section 107(a) were construed to contain an implied contribution right, moreover, it would not entitle PRPs to bring suit in the circumstances presented in this case. "Contribution" in its traditional sense is limited to a claim by one party to recover an amount from a jointly liable party *after* the first party has extinguished a disproportionate share of the parties' common liability to a third party. What respondent would need the Court to infer is not a true right to contribution (which would not avail it), but a broader right to recover costs from a cleanup undertaken without settlement or suit (and hence without any discharge of common liability).

C. In considering whether Section 107(a) should be construed to confer on a PRP a cause of action against another PRP for cost recovery, that provision must be read in light of Section 113(f), which supplies a PRP with an express cause of action against another PRP in specific circumstances. Section 113(f) delineates the exclusive circumstances under which a private PRP may bring suit against another PRP under CERCLA.

Congress added Section 113(f) to CERCLA in SARA, at a time when it was unclear whether CERCLA afforded PRPs either a right to contribution or a broader right to cost recovery. It would have been peculiar for Congress in SARA to supply PRPs with an express cause of action for *contribution*, but not a broader express cause of action for *cost recovery in general*, if it intended to permit the latter as well as the former type of action. The legislative history of SARA, moreover, suggests that Congress was operating on the assumption that a private PRP could *not* sue another PRP for cost

recovery under Section 107(a). A contrary interpretation would potentially allow a PRP to circumvent various limitations on an action under Section 113(f): *i.e.*, the typically more stringent limitations period applicable to actions under that provision, the bar on seeking contribution from a PRP that has settled with the government, the prohibition on recovering more than an equitable share of the costs, and (as here) the requirement that a PRP first be sued (or reach a settlement) before seeking to recover from another PRP. Neither this Court's decision in *Cooper Industries* nor the savings clause in Section 113(f) supports such an interpretation.

D. A reading of Section 107(a) that allowed PRPs to bring suit under that provision would undermine Congress's goal, in enacting CERCLA and SARA, of encouraging PRPs promptly to settle their liability with the government. Such a reading would create considerable incentives for PRPs *not* to settle with the government, so as to take advantage of the substantially more generous remedies available in a Section 107(a) action. Although the court of appeals reasoned that permitting one PRP to sue another under Section 107(a) was consistent with CERCLA's goal of encouraging voluntary cleanup of contaminated sites, there is little evidence that, in enacting CERCLA and SARA, Congress intended to promote unsupervised cleanups *at the expense of* government-supervised cleanups pursuant to settlement or suit. In fact, there is ample evidence that Congress did not so intend. Moreover, requiring private PRPs to bring suit only under Section 113(f) will leave those PRPs with considerable incentives to engage in voluntary cleanups. The court of appeals' suggestion that EPA would choose to forgo enforcement action or negotiated settlements simply in order to insulate a fed-

eral agency from liability when that agency is itself a PRP is wholly unfounded. In any event, the task of creating a new cause of action that is not specifically authorized in CERCLA's text falls not to the courts, but to Congress.

E. Because respondent is a PRP that has not yet been sued under Section 106 or Section 107(a) (or reached a settlement with the government), respondent is not entitled to bring suit under Section 113(f). There is no merit to respondent's argument that it could trigger a right to bring suit under Section 113(f) simply by seeking a declaration that the government was a PRP under Section 107(a)—and, in any event, that argument has been forfeited.

ARGUMENT

SECTION 107(a) OF CERCLA DOES NOT AUTHORIZE ONE POTENTIALLY RESPONSIBLE PARTY TO SUE ANOTHER FOR COST RECOVERY

Section 107(a) of CERCLA neither explicitly nor implicitly authorizes one private PRP to bring an action against another PRP for cost recovery. Section 113(f), which provides an express right of action for one PRP against another only in specified (and narrower) circumstances, confirms that understanding. The court of appeals erred by holding that a PRP that does not satisfy the requirements for bringing an action against another PRP under Section 113(f) may nevertheless bring an action against that same PRP under Section 107(a).

A. Section 107(a)(1)-(4)(B) Permits Only A Person Who Is Not A Potentially Responsible Party To Sue A Potentially Responsible Party For Cost Recovery

Section 107(a)(1)-(4)(B) does not authorize one PRP to sue another, and the court of appeals' contrary conclusion was erroneous.

1. Section 107(a) provides that PRPs—*i.e.*, the universe of persons who fall into the four categories enumerated in Section 107(a)(1)-(4)—shall be liable for all government-incurred "costs of removal or remedial action" and for "any other necessary costs of response incurred *by any other person* consistent with the national contingency plan." 42 U.S.C. 9607(a)(1)-(4)(A) and (B) (emphasis added). As the court of appeals noted (Pet. App. 14a), a PRP unquestionably constitutes a "person" for purposes of CERCLA. See CERCLA § 101(21), 42 U.S.C. 9601(21). The most natural reading of the phrase "any *other* person," therefore, is that it excludes the "persons" that are the subject of the sentence: *i.e.*, PRPs. See, *e.g.*, *Porto Rico Ry., Light & Power Co.* v. *Mor*, 253 U.S. 345, 348 (1920) ("When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."); cf. *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 342-343 & n.3 (2005) (holding that statutory phrase "another country" excluded countries listed in previous clauses, and, in doing so, explaining that "both 'other' and 'another' are just as likely to be words of *differentiation* as they are to be words of connection").

Under that reading, Section 107(a)(1)-(4)(B) has substantial operative effect, because it provides a cause of

action for all other persons who are not PRPs: namely, "innocent" private parties that have incurred the requisite costs. See *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1120 (3d Cir. 1997) (stating that "a section 107 action brought for recovery of costs may be brought only by *innocent* parties that have undertaken clean-ups"); *United Technologies Corp.* v. *Browning-Ferris Indus.*, 33 F.3d 96, 100 (1st Cir. 1994) (noting that "it is sensible to assume that Congress intended only innocent parties—not parties who were themselves liable—to be permitted to recoup the whole of their expenditures"), cert. denied, 513 U.S. 1183 (1995). For example, "a landowner forced to clean up hazardous materials that a third party spilled onto its property or that migrated there from adjacent lands" can bring suit against PRPs to recover costs incurred in cleaning up its property under certain conditions. *Akzo Coatings, Inc.* v. *Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994). A person who qualifies as a "bona fide prospective purchaser" of property can also bring suit, because, by operation of statute, such a person does not constitute a PRP. See CERCLA §§ 101(40) and 107(r)(1), 42 U.S.C. 9601(40) and 9607(r)(1) (Supp. III 2003). Only persons who fall within the statutory definition of PRPs (and are unable to invoke a statutory defense or exclusion) are disabled from bringing suit against other PRPs under Section 107(a)(1)-(4)(B), and instead must satisfy the distinct (and more stringent) requirements for bringing suit under Section 113(f).

2. Such a reading of Section 107(a)(1)-(4)(B) is particularly justified because, as this Court has held, Section 107(a)(1)-(4)(B) does not "explicitly set out" a cause of action, but instead only "impliedly authorizes suit" by private parties against PRPs. *Key Tronic Corp.* v.

United States, 511 U.S. 809, 818 (1994); but see *id.* at 822 (Scalia, J., dissenting in part) (characterizing provision as creating an express cause of action on behalf of unspecified private parties). As the Court has explained, Section 107(a)(1)-(4)(B) thus stands in contrast to Section 113(f), which "expressly authorizes contribution claims." *Ibid.*[8]

This Court has repeatedly warned against judicial inference of private rights of action not specifically authorized by Congress. See, *e.g.*, *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004); *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 & n.3 (2001); *Alexander* v. *Sandoval*, 532 U.S. 275, 287-288 (2001). Just as courts should be reluctant to infer rights of action in the first place, so too should they be reluctant to construe such rights of action broadly. See, *e.g.*, *Malesko*, 534 U.S. at 74 (concluding that "[t]he caution toward extending * * * remedies [under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)] into any new context" forecloses liability for private corporations); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191

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[8] In *Key Tronic*, the Court stated in passing that Section 107(a)(1)-(4)(B) impliedly authorizes "private parties" to recover cleanup costs from "other PRPs"—thereby suggesting that a PRP might have an implied right to contribution under that provision. 511 U.S. at 818; see *id.* at 818 n.11 ("That § 107 imposes liability on *A* for costs incurred 'by any other person' *implies*—but does not expressly command—that *A* may have a claim for contribution against those treated as joint tortfeasors."); *Union Gas*, 491 U.S. at 21-22 (plurality opinion). As the Court subsequently explained in *Cooper Industries*, however, that suggestion constituted dictum, because the ability of one PRP to sue another under Section 107(a) was not contested in *Key Tronic* and the Court "did not address the relevance, if any, of [the plaintiff's] status as a PRP." *Cooper Industries*, 543 U.S. at 170.

(1994) (declining to infer aiding-and-abetting liability under Section 10(b) of the Securities Exchange Act of 1934); *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988) (declining to permit *Bivens* action for denial of Social Security disability benefits). The practical consequence of the court of appeals' reading of Section 107(a)(1)-(4)(B) would be to confer upon an entire class of plaintiffs a cause of action that is not expressly authorized in CERCLA's text. To be sure, it is "unquestionably" true that Section 107(a)(1)-(4)(B) allows at least some private parties to sue PRPs, see *Key Tronic*, 511 U.S. at 818—just as it is unquestionably true that Section 107(a)(1)-(4)(A) allows enumerated governmental entities to bring suit. At a minimum, however, any implied right of action in Section 107(a)(1)-(4)(B) should be limited to those parties that are unambiguously entitled to invoke it.

3. Because the language and structure of Section 107(a)(1)-(4)(B) not only fail to authorize PRPs to bring suit, but in fact foreclose them from doing so, there is no need to consult the legislative history. See *Cooper Industries*, 543 U.S. at 167 (noting that, "[g]iven the clear meaning of the text, there is no need * * * to consult the purpose of CERCLA at all"). The legislative history, however, confirms that reading of the statutory text.

The language that would eventually become Section 107(a)(1)-(4) was drawn from language in the version of the bill that was reported out of the Senate Committee on the Environment and Public Works. See S. 1480, 96th Cong. § 4(a) (as reported, Nov. 18, 1980). That bill provided that PRPs "shall be jointly, severally, and strictly liable" for "all costs of removal or remedial action incurred by the United States Government or a State, and * * * any other costs incurred *by any per-*

son to remove a hazardous substance." *Ibid.* (emphasis added). Shortly before the bill was enacted, however, a substitute bill was introduced by Senators Stafford and Randolph that, *inter alia*, replaced the phrase "by any person" with the phrase "by any other person." See S. 1480, 96th Cong. § 107(a)(1)-(4)(B) (as amended, Nov. 21, 1980). Although the legislative history does not shed light on that particular change, the only plausible explanation for it was that Congress intended to exclude PRPs from bringing suit under what would become Section 107(a)(1)-(4)(B), since PRPs unambiguously would have been able to do so under the prior version of the bill. The fact that Congress considered, but chose not to enact, language that unquestionably would have allowed PRPs to bring suit for cost recovery counsels against giving the same reading to the language that Congress ultimately enacted. See, *e.g.*, *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 162-163 (2004).

4. The court of appeals in this case held that "'any other person' means any person other than the statutorily enumerated 'United States Government or a State or an Indian tribe.'" Pet. App. 14a; see *Metropolitan Water Reclamation Dist.* v. *North Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 835 (7th Cir. 2007) (same). That alternative reading of Section 107(a)(1)-(4)(B) lacks merit.

Section 107(a)(1)-(4)(A), the preceding subparagraph, provides a cause of action for "the United States Government or a State or an Indian tribe" against PRPs. 42 U.S.C. 9607(a)(1)-(4)(A). It does not necessarily follow, however, that the phrase "any other person" in Section 107(a)(1)-(4)(B) was intended to refer to, and thereby exclude, only those enumerated governmental entities, rather than the persons who are the subject of

the sentence (*i.e.*, PRPs). In fact, other language in Section 107(a)(1)-(4)(B) definitively forecloses that interpretation. Section 107(a)(1)-(4)(B) permits recovery only for "any other necessary costs of response * * * consistent with the national contingency plan"—*i.e.*, costs *other* than the government's costs as specified in Section 107(a)(1)-(4)(A). See, *e.g.*, *Wickland Oil Terminals* v. *Asarco, Inc.*, 792 F.2d 887, 891 (9th Cir. 1986).[9] Because that language already precludes governmental entities from recovering under Section 107(a)(1)-(4)(B), the court of appeals' interpretation of the phrase "any other person" as excluding governmental entities, far from giving that phrase meaning, would render it entirely superfluous—in contravention of the fundamental canon of statutory construction that "a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); see, *e.g.*, *Cooper Industries*, 543 U.S. at 166; *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004); *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001). Indeed, the court of appeals' interpretation would read out of the statute the very word—"other"—that was added to the bill shortly before its final passage. Section 107(a)(1)-

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[9] Section 107(a)(1)-(4)(A) allows the enumerated governmental entities to recover "all costs of removal or remedial action * * * *not inconsistent with the national contingency plan*." 42 U.S.C. 9607(a)(1)-(4)(A) (emphasis added). Lower courts have interpreted the emphasized language as shifting the burden to the defendant to show that the plaintiff's costs are inconsistent with the national contingency plan. See *Carson Harbor Village, Ltd.* v. *County of Los Angeles*, 433 F.3d 1260, 1265 (9th Cir. 2006); *United States* v. *E.I. du Pont de Nemours & Co.*, 432 F.3d 161, 178 (3d Cir. 2005) (en banc).

(4)(B) therefore does not explicitly authorize one PRP to bring suit against another for cost recovery.[10]

B. Section 107(a) Does Not Implicitly Permit A Potentially Responsible Party Like Respondent To Sue Another Potentially Responsible Party To Recover Its Voluntary Cleanup Costs

The court of appeals held in the alternative that Section 107(a) contains an implied right to contribution, distinct from the cause of action for cost recovery contained in Section 107(a)(1)-(4)(B). Pet. App. 15a. That is incorrect. But even if Section 107(a) did contain an implied (or common-law) right to contribution, it would not entitle PRPs to bring suit in the circumstances presented here.

1. As a preliminary matter, Section 107(a) is best read as not giving rise to an implied right to contribution at all. This Court observed in *Cooper Industries* that the case for such an implied contribution right was at best "debatable." 543 U.S. at 162. As the Court has noted, the fact that a statute does not "expressly create[] a right to contribution" is itself "significant," because, in other instances, "when Congress intended to provide a right to contribution, it did so expressly." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 91 & n.24 (1981). And the fact that Con-

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[10] It could perhaps be argued that "any other person" should be understood to mean any person other than the PRP that is the defendant in the action. That reading would give at least some meaning to the phrase "any other person," even though the United States Code is replete with statutes authorizing "any person" to bring suit against a defendant. But, in all events, it cannot be reconciled with the text of the statute, which provides that *all* PRPs, in the conjunctive, "shall be liable for * * * costs * * * incurred by any *other* person." 42 U.S.C. 9607(a)(1)-(4) (emphasis added).

gress provided a cause of action for cost recovery in Section 107(a)(1)-(4) to governmental entities (and private parties other than PRPs) further undermines the conclusion that Congress implicitly provided a cause of action for contribution to PRPs at the same time. See, *e.g.*, *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479, 487-488 (1996) (stating that, "where Congress has provided elaborate enforcement provisions for remedying the violation of a federal statute, as Congress has done with * * * CERCLA, it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under the statute") (internal quotation marks omitted); cf. *Alexander* v. *Sandoval*, 532 U.S. 275, 290 (2001) (noting that "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others"). Moreover, nothing in the text of Section 107(a) "indicates that [it] w[as] enacted for the special benefit of a class of which [the plaintiff] is a member." *Northwest Airlines*, 451 U.S. at 92. Using similar reasoning, this Court has refused to recognize implied (or common-law) rights to contribution in other federal statutes. See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 638-647 (1981); *Northwest Airlines*, 451 U.S. at 90-99.

Congress's enactment of an express, but limited, right to contribution in Section 113(f) shuts the door on any argument that Section 107(a) contains an implied right to contribution. If the statutory scheme contained two contribution rights—one implied and one express—numerous questions about their interaction would arise, and it would be hard to imagine that Congress would leave those questions unaddressed when it enacted Section 113(f)'s express contribution provision. Section

113(f) is thus best understood as occupying the field with respect to contribution claims under CERCLA. See pp. 26-36, *infra*.

The legislative history of Section 107(a) supports the conclusion that Section 107(a) does not contain an implied right to contribution. As noted above, the bill that was reported out of the Senate Environment and Public Works Committee provided that "any person"—unambiguously including PRPs—could bring suit for cost recovery under what would become Section 107(a)(1)-(4)(B). See S. 1480, 96th Cong. § 4(a) (as reported, Nov. 18, 1980). In a different subsection, that bill also provided that, "in any action brought under this section * * *, a person held jointly and severally liable with one or more other persons is entitled to seek contribution from such persons to the extent of the proportionate liability of such persons." *Id.* § 4(f). In the enacted version, Congress not only replaced the phrase "any person" with the phrase "any other person," as discussed above, but also deleted the subsection providing an express right to contribution. The fact that Congress considered, and evidently rejected, language that unquestionably would have created an express right to contribution counsels against finding an implied right to contribution in the language that Congress ultimately did enact.

2. Even if Section 107(a) did contain an implied right to contribution, moreover, it would not help respondent, because Section 107(a) would at most contain an implied right to "contribution" in its "traditional sense": *i.e.*, a claim by one party to recover an amount from a jointly liable party *after* the first party had extinguished a disproportionate share of their common liability to a third party. *United Technologies*, 33 F.3d at 99. What re-

spondent needs in order to prevail is not an implied right to contribution, but a much broader right to recover costs from a voluntary cleanup in the absence of an underlying suit or settlement. Section 107(a) cannot be understood to have conferred that broader right.

After Congress deleted language that would have provided an express right to contribution (and other language providing for joint and several liability in an action for cost recovery), various members of Congress suggested that common-law principles would govern any liability issues not expressly addressed by the statute. See, *e.g.*, 126 Cong. Rec. 30,932 (1980) (statement of Sen. Randolph) (stating that "[i]t is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law," and citing joint and several liability as an example); *id.* at 31,965 (statement of Rep. Florio) (stating that "[i]ssues of joint and several liability not resolved by this [statute] shall be governed by traditional and evolving principles of common law"). Those statements, however, provide no support for the broad implied right recognized by the court of appeals, which goes well beyond the bounds of any historical notion of contribution.

Traditionally, "[a]t common law, there was no right to contribution among joint tortfeasors." *Northwest Airlines*, 451 U.S. at 86. By the time of CERCLA's enactment, however, a right to contribution was available in most States when (1) two (or more) persons were jointly liable to a third party for a debt or injury and (2) one of those persons had extinguished a disproportionate share of that liability. See, *e.g.*, *id.* at 87-88 (noting that, "[t]ypically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors

has paid more than his fair share of the common liability"). Indeed, EPA emphasized that precise point in a guidance document issued shortly before the enactment of the express contribution provision in Section 113(f). See 50 Fed. Reg. 5038 (1985) ("Contribution among responsible parties is based on the principle that a jointly and severally liable party who has paid all or a portion of a judgment or settlement may be entitled to reimbursement from other jointly or severally liable parties.").

In order to invoke the right to contribution, therefore, a party was generally required to resolve an underlying common liability to a third party. See, *e.g.*, Restatement (Second) of Torts § 886A(2) (1979) ("The right of contribution exists only in favor of a tortfeasor who has discharged the entire claim for the harm by paying more than his equitable share of the common liability").[11] Although a party could seek contribution in some jurisdictions while proceedings concerning the underlying liability were still underway, a party could not seek contribution when there was no final judgment or pending action that would determine and extinguish the joint liability, unless the party had entered into a settlement

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[11] See also Restatement (Third) of Torts § 23 cmt. b, at 284 (2000) (explaining that "[a] person seeking contribution must extinguish the liability of the person against whom contribution is sought for that portion of liability, either by settlement with the plaintiff or by satisfaction of judgment"); Uniform Contribution Among Tortfeasors Act § 1(b), 12 U.L.A. 194 (1996) (1955 Revised Act) ("The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability."); *Black's Law Dictionary* 297 (5th ed. 1979) ("Under principle of 'contribution,' a tortfeasor against whom a judgment is rendered is entitled to recover proportional shares of judgment from other joint tort-feasors whose negligence contributed to the injury and who were also liable to the plaintiff.").

that discharged the liability. See, *e.g.*, *id.* § 886A cmt. *i*; Uniform Contribution Among Tortfeasors Act § 3(d), 12 U.L.A. 251 (1996) (1955 Revised Act).

In this case, respondent sought a recovery far outside the scope of contribution as that concept was traditionally understood. Instead, respondent sought to recover costs for which it *may* ultimately be responsible under CERCLA, but as to which no suit against it was underway (and no settlement had been reached). Section 107(a) does not contain an implied right to "contribution" in that broader sense.

C. Section 113(f) Provides The Exclusive Mechanisms By Which A Potentially Responsible Party Can Sue Another Under CERCLA

In considering whether Section 107(a) could be construed to confer on a private PRP a cause of action against another PRP for cost recovery, that provision must be read in light of Section 113(f), which supplies a PRP with an express cause of action against another in two specific circumstances: (1) when the PRP is seeking contribution "during or following [a] civil action" under Section 106 or Section 107(a), see CERCLA § 113(f)(1), 42 U.S.C. 9613(f)(1); or (2) when the PRP is seeking contribution following an administrative or judicially approved settlement with the federal or state government, see CERCLA § 113(f)(3)(B), 42 U.S.C. 9613(f)(3)(B).

Section 113(f) delineates the exclusive circumstances under which one private PRP may bring suit against another under CERCLA. That conclusion is supported by two canons of construction. First, "the implications of a statute may be altered by the implications of a later statute." *United States* v. *Fausto*, 484 U.S. 439, 453 (1988); see *United States* v. *Estate of Romani*, 523 U.S.

517, 530 (1998) (explaining that, where the meaning of an earlier statute was "unresolved," the later statute should be treated as governing). Second, "a more specific statute will be given precedence over a more general one, regardless of their temporal sequence." *Busic* v. *United States*, 446 U.S. 398, 406 (1980). In the context of remedial statutes, this Court has repeatedly held that "a precisely drawn, detailed statute pre-empts more general remedies." *Block* v. *North Dakota*, 461 U.S. 273, 285 (1983); see *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 121 (2005); *Brown* v. *GSA*, 425 U.S. 820, 834-835 (1976); *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973) (explaining that a remedy that has been "explicitly * * * designed" for a specific situation "must be understood to be the exclusive remedy available in a situation" where it "clearly applies," notwithstanding the "broad language" of a general remedy and "the literal applicability of its terms").

1. As noted above, Congress added Section 113(f) to CERCLA in 1986 as part of SARA. In the immediate aftermath of CERCLA's enactment, lower courts had disagreed on whether one PRP could bring suit against another PRP for contribution as that concept was traditionally understood, and, if so, whether Section 107(a)(1)-(4)(B) constituted the source of that cause of action. Compare, *e.g.*, *United States* v. *New Castle County*, 642 F. Supp. 1258, 1261-1269 (D. Del. 1986) (holding that PRP had right to contribution under federal common law), with *United States* v. *Westinghouse Elec. Corp.*, No. IP 83-9-C, 1983 WL 160587, at *3-*4 (S.D. Ind. June 29, 1983) (holding that PRP had no right to contribution); see also *Cooper Industries*, 543 U.S. at 162 (citing other cases). As the text of the statute reflects and the legislative history confirms, Section 113(f)

resolved the uncertainty over the availability and nature of a PRP's right to sue by supplying an express cause of action for contribution in the traditional sense. See, *e.g.*, H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 3, at 18 (1985) (explaining that Section 113(f) "clarifies and emphasizes that persons who settle with EPA (and who are therefore not sued), as well as defendants in CERCLA actions, have a right to seek contribution from other potentially responsible parties"); H.R. Rep. No. 253, *supra*, Pt. 1, at 79 (stating that Section 113(f) "clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances"); S. Rep. No. 11, 99th Cong., 1st Sess. 44 (1985) (same).[12]

In the wake of CERCLA's enactment, it was similarly uncertain whether one PRP could bring suit against another PRP for cost recovery under Section 107(a) when the plaintiff PRP had not yet been sued (or reached a settlement with the government) for its underlying liability. We are aware of only two federal courts that had unambiguously held that a PRP was entitled to sue another PRP for costs under those circumstances. See *City of New York* v. *Exxon Corp.*, 633 F. Supp. 609, 615-618 (S.D.N.Y. 1986); *City of Philadelphia* v. *Stepan Chem. Co.*, 544 F. Supp. 1135, 1140-1143 (E.D. Pa. 1982); cf. *Pinole Point Props., Inc.* v. *Bethlehem Steel Corp.*, 596 F. Supp. 283, 290-292 (N.D. Cal. 1984) (allowing suit for declaratory relief). In some other

[12] The specific cases cited in the legislative history all involved contribution in the traditional sense. See H.R. Rep. No. 253, *supra*, Pt. 1, at 74, 79; S. Rep. No. 11, *supra*, at 44.

cases, private PRPs were allowed to bring suit against other PRPs, but, to the extent that the availability of a cause of action was even disputed, it is unclear whether the plaintiffs had first been sued (or reached settlements), see, *e.g.*, *Wickland Oil Terminals*, 792 F.2d at 891, or whether the plaintiffs were even PRPs at all, see, *e.g.*, *Walls* v. *Waste Res. Corp.*, 761 F.2d 311, 313-314 (6th Cir. 1985). In light of the uncertainty over the question whether Section 107(a) afforded either a right to contribution in the traditional sense or a broader right to cost recovery on behalf of PRPs that had not first discharged their liability, it would have been peculiar for Congress in SARA to supply PRPs with an express cause of action for *contribution*, but not a broader express cause of action for *cost recovery*, if it intended to permit the latter as well as the former type of action.

Indeed, the legislative history of SARA suggests that Congress was operating on the assumption that a PRP could *not* pursue an action against another PRP for cost recovery under Section 107(a). For example, the House Energy and Commerce Committee stated that Section 113(f) "does not affect the right of the *United States* to maintain a cause of action for cost recovery under Section 107 or injunctive relief under Section 106, whether or not the U.S. was an owner or operator of a facility or a generator of waste at the site" (and therefore a PRP). H.R. Rep. No. 253, *supra*, Pt. 1, at 79-80 (emphasis added). The necessary implication of that statement is that the Committee believed that a *private* PRP was not entitled to "maintain a cause of action for cost recovery under Section 107" in the first place—or, at most, that any such cause of action would not survive the enactment of Section 113(f).

2. After SARA's enactment, but before this Court's decision in *Cooper Industries*, the courts of appeals generally held that a PRP could not sue another for cost recovery, on a theory of joint and several liability, under Section 107(a). See p. 6, note 5, *supra* (citing cases). Those courts correctly reasoned, in various contexts, that recognizing a broader right to cost recovery under Section 107(a) would effectively allow a PRP to circumvent the specific limitations on an action under Section 113(f). See, *e.g.*, *Bedford Affiliates* v. *Sills*, 156 F.3d 416, 424 (2d Cir. 1998) (reasoning that, if a PRP could sue under Section 107(a), "[a] recovering liable party would readily abandon a § 113(f)(1) suit in favor of the substantially more generous provisions of § 107(a)"); *United States* v. *Colorado & E. R.R.*, 50 F.3d 1530, 1536 (10th Cir. 1995) (noting that, "were PRPs * * * allowed to recover expenditures incurred in cleanup and remediation from other PRPs under § 107's strict liability scheme, § 113(f) would be rendered meaningless").

Those cases identify three primary ways in which permitting PRPs to sue under Section 107(a) would undermine the express limitations that Congress incorporated in Section 113(f). First, courts refused to permit a PRP that was outside the three-year limitations period for an action under Section 113(f), see CERCLA § 113(g)(3), 42 U.S.C. 9613(g)(3), to take advantage of the potentially more generous limitations period for an action under Section 107(a), see CERCLA § 113(g)(2), 42 U.S.C. 9613(g)(2). See *New Castle County*, 111 F.3d at 1119-1124; *United Technologies*, 33 F.3d at 101. As the First Circuit explained, "carried to its logical extreme, such a reading would completely swallow [Section 113(g)(3)'s] three-year statute of limitations associated with actions for contribution" and thereby "ineluc-

tably produce[] judicial nullification of an entire SARA subsection." *Ibid.*[13]

Second, when one PRP had already settled with the government (and thus could not be sued under Section 113(f) because of the settlement bar in Section 113(f)(2)), courts refused to allow other PRPs to sue the settling PRP under Section 107(a), which contains no analogous settlement bar against an action for cost recovery. See *Colorado & E. R.R.*, 50 F.3d at 1536; *Akzo Coatings*, 30 F.3d at 764. Those courts explained that allowing such suits by PRPs under Section 107(a) would "emasculate the contribution protection component of CERCLA's settlement framework," *United Technologies*, 33 F.3d at 102, and "throw the proverbial monkey wrench into the works," because "[c]onsent agreements would no longer provide protection[] and settling parties would have to endure additional rounds of litigation to apportion their losses." *In re Reading Co.*, 115 F.3d 1111, 1119 (3d Cir. 1997).

Third, courts refused to permit a PRP to pursue an action against another PRP for joint and several liability under Section 107(a) in lieu of an action under Section 113(f), which permits recovery only for an equitable share of the costs. See *Centerior Service Co.* v. *Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 347-356 (6th Cir. 1998); *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298, 1301-1306 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998). As one court explained, a contrary approach "is not supported by CERCLA's text,

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[13] This Court has repeatedly cited the existence of a shorter limitations period as evidence that Congress intended a specific remedial provision to be exclusive. See, *e.g.*, *City of Rancho Palos Verdes*, 544 U.S. at 122-123; *Block*, 461 U.S. at 285; *United States* v. *A.S. Kreider Co.*, 313 U.S. 443, 447-448 (1941).

is inconsistent with the traditional doctrine of contribution, entails a significant risk of producing unfair results, and runs the risk of creating procedural chaos." *Id.* at 1303.

3. There is similarly no justification for allowing a PRP to bring suit under Section 107(a) and thereby circumvent a fourth limitation contained in Section 113(f): *viz.*, the limitation that a PRP may bring suit under Section 113(f) only "during or following [a] civil action" under Section 106 or Section 107(a) (or after a settlement has been reached). See *Cooper Industries*, 543 U.S. at 166-168 (construing and enforcing that restriction). In holding that a PRP could evade that limitation by bringing suit directly under Section 107(a), the court of appeals in this case attempted to mitigate the disruptive consequences of its decision by stating, without explanation, that a PRP would be foreclosed from bringing suit under Section 107(a) when it could have brought suit instead under Section 113(f)(1). See, *e.g.*, Pet. App. 17a (asserting that "liable parties which have been subject to §§ 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continued vitality").

Under the court of appeals' view, therefore, once a PRP had been sued under Section 106 or Section 107(a), the PRP would be permanently barred from bringing suit under Section 107(a), even if the PRP could satisfy the requirements for doing so, and would instead be permitted to bring suit only under Section 113(f). But that *ipse dixit*, under which a PRP may bring suit under Section 107(a) before, but not after, an action against the PRP under Section 106 or Section 107(a) has been commenced, finds no support even in the court of appeals' improbable reading of the statutory text. To the contrary, it requires the court to pile an entirely atextual

limit on its already strained interpretation of the text of Section 107(a) in an effort to allow its judicially fashioned remedy to coexist with the express remedial scheme created by Congress in SARA. The inevitable conflicts between Section 107(a) and Section 113(f) under the court of appeals' reading of Section 107(a) should have been a signal that its rejection of the government's reading of Section 107(a) was in error. Instead, the court of appeals saw it as an invitation to engage in further judicial lawmaking in reconciling its new Section 107(a) right with the textual provisions of Section 113(f). To make matters worse, the court of appeals' reading would still render some language from Section 113(f)—including the very language requiring a pending or completed Section 106 or Section 107 action that this Court construed in *Cooper Industries*—effectively inoperative, in contravention of the rule against superfluity.[14]

4. Nothing in this Court's decision in *Cooper Industries* undermines the settled understanding that a PRP cannot sue another for cost recovery, on a theory of joint and several liability, under Section 107(a). To the contrary, the Court's reasoning strongly suggests that no such right of action exists. To be sure, the Court expressly left open the question presented by this case. 543 U.S. at 168-171. But it noted, without disapproval,

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[14] The court of appeals' reading cannot be justified on the ground that Section 113(f) provides the exclusive mechanisms for bringing suit for *contribution*—and thereby displaced Section 107(a) only to the extent that Section 107(a) had provided a right to contribution (as opposed to cost recovery). Contribution is merely a form of cost recovery, not a wholly independent type of relief. See, *e.g.*, *Centerior Service*, 153 F.3d at 350. For the reasons stated above, it would have been strange for Congress expressly to codify in Section 113(f) the right of PRPs to contribution in the traditional sense, and yet not do the same for an alleged broader right to cost recovery on behalf of the same parties.

the "numerous decisions of the Courts of Appeals" holding that PRPs could not bring suit under Section 107(a). *Id.* at 169. Moreover, in rejecting the PRP's claim in that case that it could bring suit under Section 113(f) without regard to the "during or following [a] civil action" requirement of Section 113(f)(1), the Court reasoned that allowing such a claim "would render part of the statute entirely superfluous." *Id.* at 166. The Court further explained that "[t]here is no reason why Congress would bother to specify conditions under which a person may bring a contribution claim, and at the same time allow contribution actions absent those conditions." *Id.* at 167. The same reasoning supports the conclusion that a PRP cannot circumvent the various limitations on an action under Section 113(f) simply by bringing suit under Section 107(a).

In revisiting its earlier precedent holding that a PRP could not bring suit under Section 107(a), the court of appeals in this case relied on the Court's statement, in a footnote in *Cooper Industries*, that the remedies provided by Section 107(a) and Section 113(f) are "clearly distinct." 543 U.S. at 163 n.3. That is unquestionably true, in that Section 107(a) and Section 113(f) have different prerequisites for bringing suit and provide different forms of relief for different categories of plaintiffs. It does not follow, however, that a PRP may bring suit under either provision.[15] The court of appeals implicitly

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[15] Indeed, before this Court's decision in *Cooper Industries*, many courts of appeals had noted that the remedies provided by Section 107(a) and Section 113(f) are distinct in holding that a PRP was *foreclosed* from bringing suit under Section 107(a). See, *e.g.*, *New Castle County*, 111 F.3d at 1120; *Reducing Carriers, Inc.* v. *Saraland Apartments*, 94 F.3d 1489, 1496 n.7 (11th Cir. 1996); *United Technologies*, 33 F.3d at 100.

recognized as much in its felt need to limit a PRP to its Section 113(f)(1) remedies, when they are available. If the remedies were fully distinct, there would be no need or justification for the court of appeals' atextual limits on the Section 107(a) action it bestowed upon PRPs. The salient point is not that Section 113(f) constitutes a *distinct* remedy, but rather that Congress intended Section 113(f) to constitute the *exclusive* remedy for PRPs under CERCLA.[16]

5. The savings clause in Section 113(f)(1) does not dictate a different result. That clause provides that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [Section 106 or Section 107]." That clause, however, saves only actions for "contribution"—and there is no reason to think that the savings clause uses the term "contribution" in anything other than its traditional sense: *i.e.*, a claim asserted by a jointly-liable party that has already extinguished (or been sued for) a disproportionate share of a common liability. See, *e.g.*, *Field* v. *Mans*, 516 U.S. 59, 69 (1995) (noting that, "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the estab-

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[16] That is not to say that Section 113(f) should be read in a vacuum, without due regard for Section 107(a), which imposes the underlying liability that is a necessary predicate for a contribution claim. Section 113(f)(1) provides that contribution may be sought from "any other person who is liable or potentially liable under [Section 107(a)]," 42 U.S.C. 9613(f)(1), and, for that reason, courts have explained that Section 107(a) and Section 113(f) work "[t]ogether" to "provide and regulate a PRP's right to claim contribution from other PRPs." *Pinal Creek Group*, 118 F.3d at 1301.

lished meaning of these terms") (citations and internal quotation marks omitted). If the savings clause were read to apply even to actions by PRPs for broader relief under Section 107(a), it would enable a PRP, notwithstanding the language of Section 113(f)(1), to bring suit even *before* an action under Section 106 or Section 107(a) is commenced—in contravention of the rule that a savings clause should not be interpreted to nullify operative language in the same statute in which it is contained. See, *e.g.*, *AT&T Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 227-228 (1998). Instead, the savings clause merely preserves the ability of a PRP to bring an action for contribution (as traditionally defined) under any other provision of law, including state law. See, *e.g.*, *Atherton* v. *FDIC*, 519 U.S. 213, 227-228 (1997).

The argument based on the savings clause also fails as a textual matter. The savings clause cannot be read as saving an action by a PRP under Section 107(a), because the savings clause by its terms saves only "an action for contribution *in the absence of* a civil action under [Section 106] or [Section 107]." 42 U.S.C. 9613(f)(1) (emphasis added). The savings clause thus contemplates only actions for contribution that are based on provisions other than those two sections.

D. The Structure And Purpose Of CERCLA And SARA Do Not Permit A Potentially Responsible Party To Sue Another Potentially Responsible Party To Recover Cleanup Costs

In enacting CERCLA and SARA, Congress sought to promote government-supervised cleanups and to encourage PRPs promptly to settle their liability with the government. A reading of Section 107(a) that allowed PRPs to bring suit under that provision (instead of un-

der Section 113(f)) would undermine those undoubted and important congressional objectives.

1. By adding Section 113(f) to CERCLA in SARA, Congress gave the government "obvious and important leverage to encourage quick and effective resolution of environmental disputes." *Reading*, 115 F.3d at 1119. Under a proper construction of CERCLA, Section 113(f) provides considerable incentives for a PRP to enter into a settlement with the government. If a PRP settles, it will secure the ability to seek contribution itself from non-settling PRPs. See CERCLA § 113(f)(3)(B), 42 U.S.C. 9613(f)(3)(B). At the same time, it will enjoy protection from a contribution action by those PRPs. See CERCLA § 113(f)(2), 42 U.S.C. 9613(f)(2). On the other hand, if a PRP does not settle, it will be unable to seek contribution from other PRPs and may face the prospect of disproportionate liability.

Under the court of appeals' rule, however, a PRP that has not yet been sued under Section 106 or Section 107(a) may well have incentives *not* to settle with the government, in order to preserve its right to sue other PRPs under Section 107(a) and thereby take advantage of the substantially more generous remedies available in such an action. Most notably, a PRP suing another PRP for cost recovery under Section 107(a)(1)-(4)(B), like any other Section 107(a) plaintiff, could potentially proceed on a theory of joint and several liability to recover *all* of its costs, see Pet. App. 14a-15a; *Consolidated Edison Co. of New York, Inc.* v. *UGI Utils., Inc.*, 423 F.3d 90, 100 n.9 (2005), petition for cert. pending, No. 05-1323 (filed Apr. 14, 2006), whereas a PRP suing under Section 113(f), like any other plaintiff in a contribution action, is limited to recovering an equitable share of its costs, see,

e.g., *Elementis Chromium L.P.* v. *Coastal States Petroleum Co.*, 450 F.3d 607, 612-613 (5th Cir. 2006).[17]

As the court of appeals in this case recognized, if a PRP could sue another PRP for joint and several liability, it would place the burden on the defendant PRP to pursue a counterclaim against the plaintiff PRP, simply in order to avoid paying for the *plaintiff PRP's* share of the costs—and to pursue claims for contribution against other PRPs, in order to avoid paying for their shares as well. Pet. App. 15a; see *Consolidated Edison*, 423 F.3d at 100 n.9; *Amcast Indus. Corp.* v. *Detrex Corp.*, 2 F.3d 746, 748-749 (7th Cir. 1993), cert. denied, 510 U.S. 1044 (1994). To the extent that other PRPs either are not available as defendants (*e.g.*, because they are defunct or insolvent) or have entered into settlements themselves, the defendant PRP—and not the plaintiff PRP that had incurred the voluntary cleanup costs in the first place—would be left holding the bag for the absent PRPs' shares of the overall liability. As one court has noted, such a result would "strain[] logic." *New Castle County*, 111 F.3d at 1121 & n.4; see *Pinal Creek Group*, 118 F.3d at 1303 (noting that such a regime "would immunize the claimant-PRP from the risk of orphan-share liability and would restrict substantially the ability of courts to apportion costs equitably pursuant to § 113(f)"), cert. denied, 524 U.S. 937 (1998); *Town of New Windsor* v. *Tesa Tuck, Inc.*, 919 F. Supp. 662, 681 (S.D.N.Y. 1996) (explaining that such a regime would lead to "sequential, piecemeal litigation").

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[17] Where a PRP is merely seeking an equitable share of the costs rather than proceeding on a theory of joint and several liability, courts have characterized the PRP's claim as a "quintessential claim for contribution." *New Castle County*, 111 F.3d at 1122; *Colorado & E. R.R.*, 50 F.3d at 1536; *Akzo Coatings*, 30 F.3d at 764.

In addition, a PRP could potentially sue another PRP for cost recovery under Section 107(a)(1)-(4)(B) even when the defendant PRP had itself reached a settlement with the government, notwithstanding the protective shield that Congress adopted to encourage such settlements in SARA. See CERCLA § 113(f)(2), 42 U.S.C. 9613(f)(2) (providing protection only against claims for "contribution"). Such a regime would create incentives not only for would-be plaintiff PRPs not to settle with the government, insofar as a PRP that did not settle could bring suit against a PRP that did, but also for would-be *defendant* PRPs not to settle, insofar as a PRP that settled would not be protected from suit. In sum, allowing PRPs to bring actions for cost recovery under Section 107(a) would considerably weaken the effectiveness of Section 113(f)'s settlement provisions and thereby compromise the government's ability to supervise, and bring closure to, CERCLA cleanups.

2. The court of appeals in this case reasoned that permitting one PRP to sue another under Section 107(a) was "consistent with CERCLA's goal of encouraging prompt and voluntary cleanup of contaminated sites." Pet. App. 18a; see *Consolidated Edison*, 423 F.3d at 100 (contending that a contrary reading of Section 107(a) would "impermissibly discourag[e] voluntary cleanup," in contravention of "one of CERCLA's main goals"). That reasoning is flawed, because there is little evidence that, in enacting CERCLA and SARA, Congress intended to promote unsupervised cleanups *at the expense of* government-supervised cleanups pursuant to settlement or suit. In fact, there is ample evidence that Congress did not so intend.

a. The text and legislative history of SARA confirms that Congress enacted SARA in order to encourage

PRPs to enter into settlements with the government. Before the enactment of SARA, EPA had expressed concern about the inefficacy and insufficiency of voluntary cleanups that had occurred at National Priorities List sites without government supervision, and had also indicated its preference for negotiated settlements over litigation as a method for effectuating cleanups. 50 Fed. Reg. 5035 (1985) ("Negotiated private party [cleanup] actions are essential to an effective program for cleanup of the nation's hazardous waste sites. * * * [E]xpeditious cleanup reached through negotiated settlements is preferable to protracted litigation."); 48 Fed. Reg. 40,661 (1983) ("EPA studies have shown that many of the response actions taken outside the sanction of EPA consent agreements have not been successful. * * * Therefore, the Agency encourages any responsible parties who are undertaking voluntary response actions at [National Priorities List] sites to contact the Agency to negotiate consent agreements.").

Consistent with the foregoing statements, the legislative history of SARA "reveals an express bent toward encouraging settlement." *E.I. du Pont de Nemours & Co.* v. *United States*, 460 F.3d 515, 536 (3d Cir. 2006) (*DuPont*), petition for cert. pending, No. 06-726 (filed Nov. 21, 2006). Thus, the House Judiciary Committee noted that "encouraging * * * *negotiated* clean-ups will accelerate the rate of clean-ups and reduce their expense by making maximum use of private sector resources," while asserting that "this emphasis on *negotiated* clean-ups should not replace or diminish a strong and aggressive enforcement policy." H.R. Rep. No. 253, *supra*, Pt. 3, at 29 (emphases added). Similarly, the House Energy and Commerce Committee explained that "[t]he settlement procedures now set forth are expected

to be a significant inducement for parties to come forth, to settle, to avoid wasteful litigation and thus to begin cleanup" and added that "[t]hese provisions should encourage quicker, more equitable settlements, decrease litigation and thus facilitate cleanups." H.R. Rep. No. 253, *supra*, Pt. 1, at 58-59.

Indeed, Congress expressly stated in the text of SARA its desire to "facilitate" negotiated settlements leading to supervised cleanups. In Section 122(a), Congress made clear that EPA has the authority to enter into negotiated settlements providing for PRPs to perform cleanups if EPA "determines that such action will be done properly by such person." 42 U.S.C. 9622(a). Moreover, Congress emphasized that, "[w]henever practicable and in the public interest, [EPA] shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation." *Ibid.*

The legislative history of SARA does contain references to the desirability of "voluntary cleanups." As to most if not all of those references, however, it is clear that "the 'voluntary' nature of the cleanups Congress had in mind was a voluntary agreement to settle and enter into a consent decree, rather than a wholly voluntary, unsupervised, *sua sponte* cleanup operation." *DuPont*, 460 F.3d at 537. For example, the House Public Works and Transportation Committee stated that "[v]oluntary cleanups are essential to a successful program for cleanup of the Nation's hazardous substance pollution program," but immediately elaborated on that statement by explaining that SARA's settlement procedures were "intended to encourage and establish procedures and protections pertaining to *negotiated* private

party cleanup of hazardous substances where such cleanup is in the public interest." H.R. Rep. No. 253, *supra*, Pt. 5, at 58 (emphasis added). Similarly, the Senate Environment and Public Works Committee noted that SARA "should encourage private party settlements and cleanups," reasoning that "[p]arties who settle, or who pay judgments as a result of litigation, may attempt to recover some portion of their expenses and obligations in subsequent contribution litigation" and that "[p]rivate parties may be more willing to assume the financial responsibility for cleanup if they are assured that they can seek contribution from others." S. Rep. No. 11, *supra*, at 44; see H.R. Rep. No. 253, *supra*, Pt. 1, at 80 (same).

To be sure, the history of the original CERCLA legislation in 1980 contains some less qualified statements about the desirability of voluntary cleanups. See, *e.g.*, H.R. Rep. No. 1016, 96th Cong., 2d Sess., Pt. 1, at 17 (1980) (noting Congress's desire to "induce * * * persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites"); 126 Cong. Rec. 26,787 (1980) (statement of Rep. Florio) (noting that "EPA is required not to act if the responsible party or parties will take appropriate action to cleanup and contain these sites"). Those statements, however, "do not * * * establish that Congress necessarily intended that PRPs engaged in voluntary cleanups be able to seek" cost recovery from other PRPs. *DuPont*, 430 F.3d at 534. CERCLA's legislative history does not specifically suggest that Congress intended to allow PRPs to bring suit under Section 107(a) as a way of encouraging voluntary cleanups—nor does it more generally suggest that Congress intended to promote voluntary cleanups without government super-

vision *at the expense of* government-supervised cleanups pursuant to settlement or suit. To the contrary, insofar as the legislative history indicates that Congress intended to allow common-law principles to govern any liability issues not addressed by the statute, it actually suggests that Congress did *not* intend to recognize a broad right of action for PRPs under Section 107(a). See pp. 23-26, *supra*.

b. Construing CERCLA to permit PRPs to bring suit only under Section 113(f) would leave PRPs with considerable incentives to engage in such cleanups. In some cases, a cleanup by a current property owner will enhance the value of a property to such an extent that the absence of an action for cost recovery will not be a meaningful deterrent. In other cases (as was apparently true in this case), a current property owner may need to engage in a cleanup as a condition of obtaining a permit to continue operations at a contaminated site, whether under the Resource Conservation and Recovery Act (RCRA), see 42 U.S.C. 6924(u), 6925(a), or state law. Moreover, to the extent that a property owner in either of those situations wishes to recover some of its costs from other PRPs, the property owner need only enter into a settlement with the federal or state government.[18]

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[18] In fact, since this Court's decision in *Cooper Industries*, EPA has confirmed that its administrative consent orders constitute qualifying "settlements" under Section 113(f)(3)(B), thereby allowing settling parties to bring suit against other PRPs. See Memorandum from Susan E. Bromm, Director, Office of Site Remediation Enforcement, EPA, and Bruce S. Gelber, Chief, Environmental Enforcement Section, Environment and Natural Resources Division, Department of Justice, at 2 (Aug. 3, 2005) <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-rev-aoc-mod-mem.pdf>.

c. In holding that one PRP could sue another under Section 107(a), the court of appeals in this case suggested that, under a contrary rule, "the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle." Pet. App. 18a.

There is no factual basis to support that suggestion. Although courts had widely held, before this Court's decision in *Cooper Industries*, that PRPs were barred from bringing suit against other PRPs under Section 107(a), the federal government nevertheless frequently brought suit under CERCLA even when federal PRPs were potentially subject to substantial liability, thereby triggering the right to seek contribution from those PRPs. See, *e.g.*, *United States* v. *Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002), cert. denied, 537 U.S. 1147 (2003); *United States* v. *Vertac Chem. Corp.*, 46 F.3d 803 (8th Cir.), cert. denied, 515 U.S. 1158 (1995); *Coeur d'Alene Tribe* v. *Asarco Inc.*, 280 F. Supp. 2d 1094 (D. Idaho 2003); *United States* v. *Hooker Chems. & Plastics Corp.*, 850 F. Supp. 993 (W.D.N.Y. 1994). The federal government also entered into numerous settlements in cases involving federal PRPs. See, *e.g.*, 69 Fed. Reg. 67,607 (2004); *id.* at 51,326; 67 Fed. Reg. 8557 (2002); 65 Fed. Reg. 32,123 (2000); 61 Fed. Reg. 54,215 (1996).[19] Even in the highly improbable event that EPA were to start

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[19] Moreover, federal PRPs have engaged in substantial cleanup efforts of their own. For example, under the Defense Environmental Restoration Program, the Department of Defense spends some $2 billion per year to clean up contamination at active military installations and former defense properties throughout the United States. 10 U.S.C. 2701; see General Accounting Office, *Environmental Liabilities*, GAO-02-117, at 3, 7 (December 2001).

forgoing enforcement actions in cases involving federal PRPs, moreover, it would not necessarily be able to insulate those federal PRPs from liability for contribution, because enforcement actions by state or tribal authorities or "innocent" private parties (or settlement agreements with state authorities) could trigger a right to seek contribution from those PRPs under Section 113(f)(1) or (f)(3)(B).[20]

The court of appeals correctly noted that, "[w]hen [Congress] enacted SARA, it explicitly waived sovereign immunity." Pet. App. 18a; see CERCLA § 120(a)(1), 42 U.S.C. 9620(a)(1). It does not follow, however, that Congress thereby intended to allow PRPs to bring suit against other PRPs—whether governmental or non-governmental—under Section 107(a). By its terms, the waiver of sovereign immunity added to CERCLA by SARA merely provides that federal agencies "shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under [Section 107]." *Ibid.* Congress thereby authorized *valid plaintiffs* to sue federal PRPs, like non-federal PRPs, either for cost recovery under Section 107(a) or for contribution under Section 113(f). Indeed, Congress made clear that it was not otherwise altering the terms of Section 107(a). See *ibid.* (providing that "[n]othing in this section shall be construed to

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[20] In addition, to the extent that private PRPs in cases involving federal PRPs are government contractors (as is often the case), they may be able to recover some or all of their cleanup costs directly from the government under the terms of their contracts (*e.g.*, as allowable overhead), subject to any applicable legal limitations. See, *e.g.*, *E.I. du Pont de Nemours & Co.* v. *United States*, 365 F.3d 1367, 1372-1380 (Fed. Cir. 2004).

affect the liability of any person or entity under [Section 106 or Section 107]"). The hypothetical and implausible concern that the federal government could prevent private parties from availing themselves of SARA's waiver of sovereign immunity by refusing to pursue a settlement or suit does not justify reading into Section 107(a) a broad and disruptive right for PRPs to seek cost recovery against governmental and non-governmental PRPs alike.

The court of appeals' decision in this case effectively creates a new federal cause of action that is not specifically authorized in CERCLA's text. Some may argue that, as a policy matter, it would be preferable to have such a cause of action. Ultimately, however, the task of making that policy judgment should be left to Congress. Congress expressed its current policy through the text of Section 113(f), which allows one potentially responsible party to bring suit against another only if it is subject to suit itself (or has entered into a settlement). As this Court stated in another case construing CERCLA, expanding the scope of existing remedies "is a policy decision that must be made by Congress, not the courts." *Key Tronic*, 511 U.S. at 819 n.13 (citation omitted).

E. Respondent Is Not Entitled To Bring Suit Under Section 113(f)

In this case, respondent is a PRP that has not yet been sued under Section 106 or Section 107(a) (or reached a settlement). Respondent is therefore not entitled to bring suit against the federal government (or any other PRP) under either Section 107(a) or Section 113(f). In its brief supporting the petition for a writ of certiorari, respondent contended that it is nevertheless

eligible to bring suit under Section 113(f) on the theory that, even if respondent lacks a cause of action against the government under Section 107(a), it could seek a *declaration* that the government was a PRP under Section 107(a) (and thereby trigger the right to bring a claim under Section 113(f)). Br. 2-9. That contention lacks merit.

1. As a preliminary matter, respondent's argument has been forfeited because respondent failed properly to preserve it below. In the district court, respondent expressly dropped its claim under Section 113(f) in the wake of this Court's decision in *Cooper Industries*. See J.A. 35 (stating, in motion for leave to file amended complaint, that, "[u]nder [*Cooper Industries*], the Section 113(f)(1) claim may no longer be maintained"). Accordingly, the district court held only that respondent did not have a cause of action under Section 107(a). Pet. App. 21a-28a. In the court of appeals, moreover, respondent did not advance the instant argument until its reply brief, and the court of appeals did not address it. See, *e.g.*, *Navarijo-Barrios* v. *Ashcroft*, 322 F.3d 561, 564 n.1 (8th Cir. 2003) (stating that "[i]t is well settled that we do not consider arguments raised for the first time in a reply brief").

2. In any event, respondent's argument plainly lacks merit. If, as has been demonstrated, Section 107(a) does not afford a cause of action for one PRP to sue another PRP, it necessarily follows that a PRP cannot pursue a claim *for declaratory relief* against another PRP under that provision. The Declaratory Judgment Act is purely procedural and remedial in nature, see *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); it cannot supply a substantive cause of action where none exists. Thus, if PRPs are not within the class of parties

entitled to sue for the relief actually afforded by Section 107(a), they cannot overcome that fundamental flaw simply by seeking declaratory relief under the same provision. See *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 27 (1983).

Even assuming *arguendo* that one PRP could request a declaration that another party was a PRP in some circumstances, therefore, such a request would not arise under Section 107(a) and thus could not constitute "[a] civil action under [Section 107(a)]" so as to trigger the right to bring suit under Section 113(f). *Franchise Tax Bd.*, 463 U.S. at 27; cf. *Cooper Industries*, 543 U.S. at 160-161 (stating question presented as "whether a private party who has not been sued under § 106 or § 107(a) may nevertheless obtain contribution under § 113(f)(1) from other liable parties"). A contrary reading of Section 113(f) would effectively render superfluous the very statutory requirement construed in *Cooper Industries*—*viz.*, that a PRP may bring a claim for contribution only "during or following" an action under Section 106 or Section 107(a)—by enabling a PRP to manufacture a qualifying Section 107(a) action through the simple expedient of including a request for declaratory relief. Nothing in CERCLA supports such a bizarre result. Because respondent cannot meet the requirements for bringing suit against another PRP under Section 113(f), its Section 113(f) claim was without merit.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 2007

APPENDIX

1. 42 U.S.C. 9601 provides in pertinent part:

Definitions

* * * * *

(23) The terms "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604 (b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.].

(24) The terms "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the

location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

(25) The terms "respond" or "response" means remove, removal, remedy, and remedial action;, all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

* * * * *

2. 42 U.S.C. 9606 provides:

Abatement actions

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

(b) Fines; reimbursement

(1) Any person who, without sufficient cause, willfully violates,or fails or refuses to comply with, any order of the President under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

(2)(A) Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such

action, plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26.

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 9607(a) of this title may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

(E) Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate costs, fees, and other expenses in accordance with subsections (a) and (d) of section 2412 of title 28.

(c) Guidelines for using imminent hazard, enforcement, and emergency response authorities; promulgation by Administrator of EPA, scope, etc.

Within one hundred and eighty days after December 11, 1980, the Administrator of the Environmental Protection Agency shall, after consultation with the Attorney General, establish and publish guidelines for using the imminent hazard, enforcement, and emergency response authorities of this section and other existing statutes administered by the Administrator of the Environmental Protection Agency to effectuate the responsibilities and powers created by this chapter. Such guidelines shall to the extent practicable be consistent with the national hazardous substance response plan, and shall include, at a minimum, the assignment of responsibility for coordinating response actions with the issuance of administrative orders, enforcement of standards and permits, the gathering of information, and other imminent hazard and emergency powers authorized by (1) sections 1321(c)(2), 1318, 1319, and 1364(a) of title 33, (2) sections 6927, 6928, 6934, and 6973 of this title, (3) sections 300j-4 and 300i of this title, (4) sections 7413, 7414, and 7603 of this title, and (5) section 2606 of title 15.

3. 42 U.S.C. 9607 provides in pertinent part:

Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a

State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or

threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

* * * * *

4. 42 U.S.C. 9613 provides in pertinent part:

Civil proceedings

* * * * *

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved

its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) Period in which action may be brought

(1) Actions for natural resource damages

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial

action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action

may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after—

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation

No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this subchapter more than 3 years after the date of payment of such claim.

(5) Actions to recover indemnification payments

Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 9619 of this title, an action under section 9607 of this title for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) Minors and incompetents

The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

* * * * *

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Supreme Court, U.S.
FILED
APR 13 2007
OFFICE OF THE CLERK

No. 06-562

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC RESEARCH CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

According to respondent (Br. 4, 28), "all" potentially responsible parties (PRPs) can sue other PRPs for cost recovery under Section 107(a)(1)-(4)(B) of CERCLA. As the government has explained, however, that interpretation is inconsistent with the text and structure of Section 107(a). It would also render Section 113(f) essentially superfluous, negating Congress's decision to create an express and carefully delimited contribution remedy for PRPs, and frustrating Congress's clear intent to provide powerful incentives to *encourage* PRPs to settle voluntarily with the government and perform government-supervised cleanups.

Apparently recognizing the unacceptable anomalies created by its interpretation, respondent urges the Court to eliminate some of those difficulties by the simple expedient of devising an altogether different scheme from the one enacted by Congress. Thus, notwithstanding the established principle that Section 107(a) imposes joint and several liability on PRPs, respondent urges the Court to dispense with that principle when PRPs bring suit, and instead to fashion remedies that would effectively transform such PRP suits into actions for contribution—albeit ones brought by litigants who do not qualify as contribution plaintiffs under *either* the traditional understanding of contribution *or* the express terms of Section 113(f). Faced with the unpleasant fact that its interpretation would demolish the carefully crafted settlement bar that Congress erected in Section 113(f)(2), respondent offers the further antidote that the courts should simply conjure up a new, broader settlement bar that would apply to Section 107 actions as well. All of this legislative tinkering might be a reasonable proposal to Congress, but it is too much to ask of this Court. In effect, respondent invites this Court to authorize the wholesale rewriting of the remedial scheme enacted by Congress so as to overturn the result in *Cooper Industries*,

Inc. v. *Aviall Services, Inc.*, 543 U.S. 157 (2004), which invoked a straightforward application of the statutory text. The Court should apply the normal rules of statutory construction and reject respondent's invitation.

A. Section 107(a)(1)-(4)(B) Does Not Permit Responsible Parties To Sue For Cost Recovery

1. Section 107(a)(1)-(4)(B) provides that all persons in four enumerated categories (*i.e.*, PRPs) shall be liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan" (NCP). 42 U.S.C. 9607(a)(1)-(4)(B). The better reading of the phrase "any other person" is that it excludes the "persons" previously referred to in the same statutory sentence, *i.e.*, the PRPs that are the sentence's subject. The various textual arguments of respondent and its amici to the contrary are unavailing.

Respondent primarily contends (Br. 7-8) that Section 107(a)(1)-(4)(B) should be read in parallel with Section 107(a)(1)-(4)(A), and that, under that reading, the phrase "any other person" in Section 107(a)(1)-(4)(B) necessarily excludes only the persons who are entitled to bring suit under Section 107(a)(1)-(4)(A): *i.e.*, "the United States Government or a State or an Indian tribe." Such a reading would be possible (although not compelled) if Section 107(a)(1)-(4)(A) and (B) provided alternative causes of action for the recovery of the *same* costs, as respondent contends (Br. 11). But in fact Section 107(a)(1)-(4)(A) and (B) provide for recovery of *mutually exclusive* costs. While Section 107(a)(1)-(4)(A) permits recovery of "all costs of removal or remedial action * * * not inconsistent with the national contingency plan," 42 U.S.C. 9607(a)(1)-(4)(A), Section 107(a)(1)-(4)(B) permits recovery only of "any *other* necessary costs * * * consistent with the national contingency plan": *i.e.*, costs *other than* the costs of governmental entities described in Section 107(a)(1)-(4)(A).

42 U.S.C. 9607(a)(1)-(4)(B) (emphasis added). Because the "other necessary costs" language already precludes governmental entities from suing under Section 107(a)(1)-(4)(B), respondent's reading would render the word "other" in the phrase "any other person" entirely superfluous—in contravention of the rule that every word in a statute should be given some operative effect.[1]

Respondent acknowledges (Br. 10-11) that, while a prior version of the language that would become Section 107(a)(1)-(4) authorized "any person" to bring suit for "any other costs" besides those incurred by a governmental entity, see S. 1480, 96th Cong. § 4(a) (as reported, Nov. 18, 1980), a substitute bill replaced the phrase "any person" with "any *other* person." See S. 1480, 96th Cong. § 107(a)(1)-(4)(B) (as amended, Nov. 21, 1980) (emphasis added). Respondent and its amici, however, offer no explanation for that change, other than to characterize it as a "minor stylistic change" or "mere drafting edit[]." Lockheed Br. 17. But words have meaning, and "any other person" plainly does not mean the same thing as "any person." Because the prior version of the bill, by limiting recovery to "other" costs, already unambiguously prevented governmental entities from recovering under Section 107(a)(1)-(4)(B), there was no need for Congress to "clarify" that governmental entities could not recover under that provision. And while respondent correctly notes (Br. 11) that there was no discussion of that change in the legislative history,

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[1] Respondent notes (Br. 8) that, by permitting recovery of costs that are consistent with the NCP, rather than costs that are *not inconsistent* with the NCP, Section 107(a)(1)-(4)(B) has been read to place the burden on the *plaintiff* on the issue of consistency. That is true, but it does nothing to support respondent's view that "any *other* person" excludes only the governmental entities included in Section 107(a)(1)-(4)(A). Those entities could not have sued under Section 107(a)(1)-(4)(B) in any event—nor would they have any incentive to do so even if they could, given that it is more difficult to recover (and fewer costs are recoverable) under Section 107(a)(1)-(4)(B) than under Section 107(a)(1)-(4)(A).

that fact is neither dispositive, see, *e.g.*, *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 592 (1980), nor surprising, in light of the fact that the Senate passed the substitute bill on the Monday following the Friday on which it was introduced. See Pub. L. No. 96-510, 94 Stat. 2811. The history of Section 107(a)(1)-(4)(B) thus underscores that the inclusion of the word "other" was purposeful and confirms that the phrase "any other person" was intended to exclude PRPs, rather than (already excluded) governmental entities.

Contrary to respondent's contention (Br. 12), the "rule of the last antecedent" does not compel a different interpretation. As a preliminary matter, it is questionable whether that rule even applies here, because it provides only that an adjectival clause or phrase should be read to modify the noun that it immediately follows. See *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003). The adjective "other," by contrast, plainly modifies the noun that it precedes, "person," and the relevant question is thus not what the adjective "other" *modifies*, but instead to what it *refers* (and thereby excludes). Even assuming, however, that the rule could be relevant here, this Court has observed that the rule "is not an absolute and can assuredly be overcome by other indicia of meaning." *Ibid.* Here, in particular, the rule should not be read to trump the more fundamental rule against rendering statutory terms superfluous. Because the word "other" in the phrase "other necessary costs" already forecloses the possibility that the governmental entities enumerated in Section 107(a)(1)-(4)(A) could seek relief under Section 107(a)(1)-(4)(B), the *only* construction that gives meaning to the word "other" in the phrase "any other person" is one in which "other" refers to (and excludes) the PRPs listed earlier in Section 107(a)(1)-(4).

Respondent's amici contend that Section 107(a)(1)-(4)(B) should not be limited to suits by "innocent" private parties because the number of parties that would fall into that category would be "minuscule." See, *e.g.*, Consolidated Edison Br.

13. But even a modest role for a statutory provision is better than none at all (which is what respondent's view leaves the term "other"). Moreover, it is incontrovertible that Section 107(a)(1)-(4)(B) can be invoked by at least two important classes of private parties that would qualify as PRPs but for specific statutory exclusions: (1) parties that can show that the release of a hazardous substance was caused solely by the act or omission of a third party, see 42 U.S.C. 9601(35), 9607(b)(3); and (2) parties that can satisfy the statutory requirements for a "bona fide prospective purchaser," see 42 U.S.C. 9601(40), 9607(r)(1) (Supp. III 2003). Indeed, some of respondent's amici concede that they would usually be able to bring suit under the government's interpretation of Section 107(a)(1)-(4)(B). See ACWA Br. 16. When properly construed to permit only non-PRP private parties to bring suit, Section 107(a)(1)-(4)(B) thus has substantial operative effect.[2]

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[2] Respondent (Br. 5-6, 30) and its amici contend that the United States has taken conflicting positions concerning the availability of a cause of action for PRPs under Section 107(a)(1)-(4)(B). In reality, the United States has consistently maintained, in keeping with the unanimous view of the courts of appeals before this Court's decision in *Cooper Industries*, that Section 113(f) governs the procedures by which one PRP can sue another under CERCLA. See, *e.g.*, U.S. Br. at 21, *Cooper Industries*, *supra* (No. 02-1192) (stating that, "[w]hen read in combination, the clear implication of Section 107(a)(1)-(4)(B) and Section 113 is that the jointly liable party is limited to seeking contribution in the manner authorized by Section 113(f)"). In light of seemingly contrary suggestions in *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 818 & n.11 (1994), the United States did not specifically argue before this Court's decision in *Cooper Industries* that the plain text of Section 107(a)(1)-(4)(B) forecloses one PRP from bringing suit against another. Once *Cooper Industries* clarified that the suggestions in *Key Tronic* constituted dictum (see 543 U.S. at 170), however, the United States reexamined the statutory text and concluded that Section 107(a)(1)-(4)(B) does not confer a cause of action on PRPs. See, *e.g.*, U.S. Br. at 9-11, *Metropolitan Water Reclamation Dist.* v. *North Am. Galvanizing & Coatings, Inc.*, No. 05-3299, 2006 WL 1354188 (7th Cir. filed May 1, 2006).

2. All of the other arguments advanced by respondent and its amici in support of their construction of Section 107(a)(1)-(4)(B) also lack merit.

Respondent contends (Br. 20-21) that the phrase "any other person" in Section 107(a)(1)-(4)(B) should be construed as including PRPs because the same phrase appears, and is so construed, in Section 111(a). That provision specifies that the Hazardous Substances Superfund should be used for, *inter alia*, "[p]ayment of governmental response costs," 42 U.S.C. 9611(a)(1), and "[p]ayment of any other claim for necessary response costs incurred by *any other person*," subject to government authorization, 42 U.S.C. 9611(a)(2) (emphasis added). Section 111(a)(2), however, critically differs from Section 107(a)(1)-(4)(B) because the word "other" in the former provision must refer to the governmental entities that are implicitly mentioned in the previous paragraph; there is no other possible referent. The content of the term "other" obviously varies depending on the surrounding text and the universe of potential referents.[3]

Respondent relies (Br. 21-23) on regulations promulgated by EPA, but those regulations are consistent with the view that PRPs that cannot seek contribution under Section 113(f) have no remedy under Section 107(a)(1)-(4)(B). Indeed, the most relevant provision states that "[r]esponsible parties shall be liable for necessary costs of response actions * * * in-

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[3] There is no incongruity in permitting PRPs to recover response costs from the Superfund while preventing them from bringing suit against other PRPs absent an underlying suit or settlement. Private parties can seek Superfund reimbursement only with respect to costs that have been "approved under [the NCP] and certified by the responsible Federal official," 42 U.S.C. 9611(a)(2), and the relevant regulation provides that the EPA may authorize a PRP's claim "only in accordance with an order issued pursuant to [S]ection 106 * * * or a settlement with the federal government in accordance with [S]ection 122." 40 C.F.R. 300.700(d)(5). Settling PRPs—including PRPs that enter into appropriate administrative consent orders with EPA under Section 106—would generally have the right to seek contribution under Section 113(f)(3)(B).

curred by any *other* person consistent with the NCP." 40 C.F.R. 300.700(c)(2) (emphasis added). The word "other" in the phrase "any other person" necessarily refers to (and thereby excludes) the "[r]esponsible parties" that are the subject of the sentence. While another provision, 40 C.F.R. 300.700(c)(3)(ii), states that a response action carried out in compliance with a Section 106 order or a Section 122 consent decree "will be considered 'consistent with the NCP'" for purposes of cost recovery under Section 107(a)(1)-(4)(B), it does not follow that PRPs that are ineligible for Section 113(f) relief can bring suit under Section 107(a)(1)-(4)(B). A private party can be subject to an administrative order under Section 106 even if it is not a PRP, see 42 U.S.C. 9606(b)(2)(C), and, in any event, to the extent that Section 107(a)(1)-(4)(B) imposes the underlying liability that is a necessary predicate for a contribution claim under Section 113(f),[4] the regulation simply makes clear that, when a PRP is entitled to obtain contribution for cost recovery pursuant to Section 113(f), it may recover any costs covered by that regulation without having to burden itself (and the courts) with the necessity of proving consistency with the NCP—often a costly, complex, and time-consuming matter that is best resolved through administrative expertise rather than the unnecessary expenditure of judicial resources.

Finally, respondent argues (Br. 26) that CERCLA was intended to "make those responsible for the contamination pay for the cleanups." It does not follow, however, that Con-

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[4] Absent a discharge of liability by judgment or settlement with the government, PRPs *always* retain shared liability to the government for cleaning up (or paying for the cleanup) of their contaminated sites, regardless whether any private party has a cause of action under Section 107(a)(1)-(4)(B). See 42 U.S.C. 9606, 9607(a)(1)-(4)(A). Respondent thus errs in contending (Br. 2, 5-6) that PRPs have no CERCLA liability until another party has incurred response costs. Any PRP that has not discharged its liability to the government qualifies as a "person who is liable or potentially liable" under Section 106 or 107(a), and can therefore be sued under Section 113(f) by qualifying plaintiffs.

gress intended to permit any PRP to sue any other PRP for cost recovery at any time, even when the plaintiff has not yet resolved its own CERCLA liability. The government's reading of Section 107(a)(1)-(4)(B) fully effectuates CERCLA's purposes, and does so in an orderly fashion, by allowing government enforcement agencies to settle with (or take action against) PRPs before those PRPs can sue others for contribution, thereby encouraging settlements and supervised cleanups.

B. Respondent's Interpretation Cannot Account For Section 113(f), Which Provides The Exclusive Mechanisms By Which A Potentially Responsible Party Can Sue Another Under CERCLA

That *Cooper Industries* reserved the question in this case while construing Section 113(f) does not mean that Section 113(f) is irrelevant to the question here. To the contrary, that express statutory contribution provision fatally undermines the plausibility of respondent's proposed construction. Under respondent's reading, Section 113(f)'s interlocking remedial scheme for PRPs would be rendered largely superfluous, and Congress's goal of encouraging settlement with the government would be frustrated. The better view is that Section 113(f) provides the exclusive mechanisms by which one PRP can bring suit against another under CERCLA, and respondent's contrary arguments lack merit.

1. Respondent fails to come to grips with the established principle that, in the context of remedial statutes, "a precisely drawn, detailed statute pre-empts more general remedies." *Block* v. *North Dakota*, 461 U.S. 273, 285 (1983). It would have been peculiar if Congress, in enacting SARA, had supplied PRPs with an express cause of action for *contribution* (and explicitly addressed and resolved a variety of second-order issues such as the effect of settlement in those actions), but not a broader express cause of action for *cost recovery*, if

it intended to permit PRPs to pursue the latter (as well as the former) type of action.

Respondent repeatedly asserts (Br. 1, 16 n.8, 19, 23, 28, 29, 30, 43, 46) that lower courts have unanimously held that one PRP can bring suit against another for cost recovery under Section 107(a)(1)-(4)(B). Respondent thereby seemingly suggests that, because it was allegedly undisputed that one PRP could bring suit against another for cost recovery under Section 107(a)(1)-(4)(B) at the time Congress enacted SARA, Congress operated on that assumption, and left that right undisturbed, in providing an express cause of action only for *contribution* in Section 113(f). Respondent and its amici, however, utterly fail to identify the supposed plethora of cases in which lower courts held, *prior to Congress's enactment of SARA*, that one PRP could bring suit against another for cost recovery under Section 107(a)(1)-(4)(B). Instead, as previously noted (U.S. Br. 28), only a few district court cases had so held.[5]

On the other hand, at least one district court had concluded that a PRP did not have a right to cost recovery under Section 107(a)(1)-(4)(B). See *D'Imperio* v. *United States*, 575 F. Supp.

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[5] While respondent (Br. 10 nn.4 & 5) and its amici cite numerous cases, almost all of those cases are distinguishable on the grounds that (1) the case was decided *after* Congress enacted SARA in 1986 (and thus could not have informed Congress's understanding of Section 107(a)); (2) the court simply assumed, without analysis, that a PRP was entitled to bring suit under Section 107(a)(1)-(4)(B), see *Allied Towing Corp.* v. *Great Eastern Petroleum Corp.*, 642 F. Supp. 1339, 1348-1349 (E.D. Va. 1986); (3) it was unclear whether the plaintiff had first been sued or reached a settlement (and was therefore suing for contribution), see *Wickland Oil Terminals* v. *Asarco, Inc.*, 792 F.2d 887, 891 (9th Cir. 1986); (4) the plaintiff was or may have been an "innocent" party rather than a PRP, see *Walls* v. *Waste Res. Corp.*, 761 F.2d 311, 314 (6th Cir. 1985); *Artesian Water Co.* v. *Government of New Castle County*, 605 F. Supp. 1348, 1356-1357 (D. Del. 1985); *Jones* v. *Inmont*, 584 F. Supp. 1425, 1427 (S.D. Ohio 1984); or (5) the reference to PRP suits for cost recovery under Section 107(a)(1)-(4)(B) was mere dictum, see *United States* v. *New Castle County*, 642 F. Supp. 1258, 1262-1264 (D. Del. 1986).

248, 253 (D.N.J. 1983). Because it was far from settled that one PRP could sue another for cost recovery under Section 107(a)(1)-(4)(B) at the time Congress enacted SARA, the relevant question is not whether Congress impliedly repealed Section 107(a)(1)-(4)(B) by enacting Section 113(f). Instead, it is whether, when Section 107(a) and Section 113(f) are read together, the text of Section 113(f) suggests that a PRP is not entitled to bring suit under Section 107(a)(1)-(4)(B)—and the answer to that question is plainly yes. See *United States* v. *Estate of Romani*, 523 U.S. 517, 530 (1998); *United States* v. *Fausto*, 484 U.S. 439, 453 (1988).

The legislative history of SARA, moreover, supports the conclusion that Congress did not intend to permit a broader and amorphous implied cause of action for cost recovery to coexist with (and largely supplant) the narrow and carefully defined express cause of action for contribution that it supplied in SARA. Respondent does not so much as cite, much less explain, the report of the House Energy and Commerce Committee, which the United States emphasized in its opening brief (at 29). That report states that Section 113(f) "does not affect the right of the *United States* to maintain a cause of action for cost recovery under Section 107," without mentioning any corresponding "right" of private PRPs. H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. 1, at 79-80 (1985) (emphasis added). That legislative history indicates that, in enacting Section 113(f), Congress was operating on the assumption that a PRP could *not* pursue an action against another PRP for cost recovery under Section 107(a)(1)-(4)(B).

2. Respondent contends (Br. 4, 28) that "all" PRPs can sue other PRPs for cost recovery under Section 107(a)(1)-(4)(B). Under that view, of course, Section 113(f) is rendered entirely superfluous, because *any* PRP that paid response costs could sue directly under Section 107(a)(1)-(4)(B), regardless of whether it would qualify to bring a contribution action under Section 113(f). Respondent does not even attempt to justify

the absurd notion that Congress engaged in an entirely pointless and futile act in drafting Section 113(f) (and that this Court engaged in a similarly futile act in *Cooper Industries* in holding that the "during or following any civil action" limitation in Section 113(f)(1) means what it says).

At other points (*e.g.*, Br. 19), respondent seems to assume, as did the court of appeals (Pet. App. 17a), that only "voluntary remediators" could sue under Section 107(a)(1)-(4)(B), and that PRPs that made the mistake of settling with the government would be relegated to the contribution remedy provided by Section 113(f). Respondent does not, however, attempt to justify that atextual limitation on suits under Section 107(a)(1)-(4)(B), which is patently inconsistent with respondent's reading of the "any other person" phrase. For their part, respondent's amici concede that, in order to adopt that limitation, this Court would have to "create an implied exception in [Section 107(a)(1)-(4)(B)]." NRDC Br. 21 n.26.[6] Even if the Court were to engage in such radical statutory surgery, however, it would not cure the fundamental infirmity with the court of appeals' reading: *i.e.*, that a PRP could always circumvent Section 113(f)'s requirement of a pending or completed Section 106 or 107(a) action simply by bringing suit under Section 107(a)(1)-(4)(B).

---

[6] In an effort to obviate the need to "create an implied exception," NRDC suggests that, at the time Congress enacted SARA, it was "at best ambiguous" whether Section 107(a)(1)-(4)(B) conferred a right to contribution, even though Section 107(a)(1)-(4)(B) "unambiguously provided * * * a right [to cost recovery] to those who engaged in voluntary cleanups." Br. 20. Because contribution is merely a form of cost recovery (and, indeed, the form with firmer common law roots), however, and because the purportedly sweeping preexisting cause of action for cost recovery would (if it had in fact existed) have obviated any need to supply the narrower contribution remedy enacted in Section 113(f), it could not have been clear before SARA's enactment that one PRP could bring suit against another under Section 107(a)(1)-(4)(B) for cost recovery, yet simultaneously unclear whether one PRP could bring suit against another under Section 107(a)(1)-(4)(B) for contribution.

3. Finally, respondent apparently concedes (Br. 48) that, at least to the extent that it is deemed a "voluntary" rather than "compelled" remediator, its claim does not qualify as a claim for "contribution" that could be saved by the savings clause in Section 113(f)(1). Respondent is correct to make that apparent concession, because the savings clause merely preserves the ability of a PRP to bring an action for contribution (as that concept is traditionally defined) under any other provision of law, including state law. See 42 U.S.C. 9613(f)(1). The savings clause does not purport to "save" any supposed cause of action for PRPs under Section 107(a)(1)-(4)(B), as it would have done if Congress had intended PRPs to have such a remedy.

C. Section 107(a) Does Not Create An Implied Right To Contribution Separate And Apart From The Explicit Contribution Remedy Set Forth In Section 113(f)

Respondent makes no serious effort to defend the court of appeals' alternative holding that Section 107(a) contains an implied right to contribution, distinct from the cause of action for cost recovery contained in Section 107(a)(1)-(4)(B). Pet. App. 15a. In particular, respondent offers no response to the argument that Section 107(a) is best read as not giving rise to an implied right to contribution at all. Nor does respondent refute the point that any implied right of contribution would, at most, authorize contribution in its traditional sense.

Instead, respondent contends (Br. 45) only that, "[i]n the event that [it] is somehow deemed a 'compelled remediator,'" it should be entitled to avail itself of an implied right to contribution. Even assuming that Section 107(a) contained an implied right to contribution, however, the relevant question would not be whether a PRP had incurred cleanup costs under some form of "compulsion"—or, as respondent alternatively suggests (Br. 48), whether the PRP's actions "result[ed] in a complete cleanup"—but rather whether the PRP had extin-

guished its common liability to a third party through suit or settlement. Respondent does not explain how it could qualify to seek contribution notwithstanding the fact that it has indisputably not been subject to suit (or reached a settlement) with regard to the costs it seeks to recover. As a result, respondent cannot avail itself of any implied right to contribution under Section 107(a).

D. The Structure And Purpose Of CERCLA And SARA Do Not Permit A Potentially Responsible Party To Sue Another Potentially Responsible Party To Recover Cleanup Costs

Respondent offers no valid response to the argument that its reading of Section 107(a)(1)-(4)(B) would undermine Congress's goals, in enacting CERCLA and SARA, of promoting government-supervised cleanups and encouraging PRPs promptly to settle with the government.

1. Respondent disputes the proposition (Br. 39) that, under its reading of Section 107(a)(1)-(4)(B), a PRP that has not yet been sued under Section 106 or 107(a) may have incentives not to settle with the government, in order to preserve its right to sue other PRPs under the substantially more generous provisions of Section 107(a)(1)-(4)(B) rather than Section 113(f). Respondent's arguments lack merit.

First, notwithstanding the settled principle that Section 107(a) imposes joint and several liability on PRPs (in keeping with its plain text, which makes PRPs liable for "*any*" qualifying response costs), respondent contends (Br. 7) that, when (but only when) a PRP is the plaintiff, Section 107(a) should instead "impose several liability only, just as in the contribution remedy provided by § 113(f)." Respondent offers no textual basis for that inconsistent treatment, which has seemingly been rejected even by courts that have adopted respondent's reading of Section 107(a)(1)-(4)(B). See Pet. App. 15a; *Consolidated Edison Co. of New York, Inc.* v. *UGI Utils.*,

Inc., 423 F.3d 90, 100 n.9 (2d Cir. 2005), petition for cert. pending, No. 05-1323 (filed Apr. 14, 2006). Under the approach favored by those courts, however, a PRP could sue another PRP for joint and several liability, thereby placing the burden on the defendant PRP to pursue (and prove) a counterclaim against the plaintiff PRP simply in order to avoid paying for the plaintiff PRP's share of the costs.

In any event, it is uncertain whether even respondent's approach would entirely eliminate the burden on defendant PRPs, because a defendant PRP might still be required to pursue third-party claims for contribution against other PRPs in order to avoid paying for *their* shares. By proposing an atextual limitation on a PRP suit for cost recovery under Section 107(a)(1)-(4)(B) comparable to the textual limitation that Congress did impose on a PRP suit for contribution under Section 113(f), respondent makes clear that it seeks nothing less than to circumvent Section 113(f)'s requirement of a pending or completed Section 106 or 107(a) action through the simple expedient of bringing an action under Section 107(a)(1)-(4)(B). Respondent cannot simply borrow the subsidiary aspects of Section 113(f) in order to make its Section 107(a) action workable without also borrowing the major limitation of Section 113(f), which makes clear that respondent has no viable action. Cf. *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 125 (2005) (rejecting attempt to "borrow" only statute of limitations, but not other limitations, of a specific statutory cause of action).

Second, respondent claims (Br. 31) that PRPs permitted to sue under Section 107(a)(1)-(4)(B) would not receive a potentially more favorable limitation period, because actions for "first instance response costs" are never subject to the three-year limitation period for actions for contribution in Section 113(g)(3), even when asserted by a contribution plaintiff. Respondent is mistaken. Contribution is available for "first instance" response costs, see 42 U.S.C. 9613(f)(3)(B); *United*

Techs. Corp. v. *Browning-Ferris Indus.*, 33 F.3d 96, 101-102 (1st Cir. 1994), cert. denied, 513 U.S. 1183 (1995), and Section 113(g)(3) provides that "[n]o action for contribution for *any response costs*" may be brought outside the three-year limitation period. 42 U.S.C. 9613(g)(3) (emphasis added). Thus, *all* contribution claims are subject to the three-year limitation period, whereas PRPs, if permitted to sue under Section 107(a)(1)-(4)(B), could avail themselves of the potentially more generous limitation period for cost-recovery claims.

Third, respondent suggests (Br. 38) that, when one PRP sues another for cost recovery under Section 107(a)(1)-(4)(B), a court could, "where appropriate," prohibit the plaintiff PRP from recovering where the defendant PRP had itself reached a settlement with the government. It is indisputable, however, that the settlement bar enacted by Congress in SARA provides protection only against actions for "contribution," not actions for cost recovery. 42 U.S.C. 9613(f)(2).[7] In proposing (Br. 38) that courts ignore the *expressio unius* principle and create out of thin air a parallel settlement bar that would miraculously extend to cost-recovery actions "precisely the same settlement protection" afforded to contribution actions by Section 113(f)(2), respondent once again seeks to borrow complementary parts of Section 113(f) while ignoring

[7] Amicus Lockheed contends (Br. 25-26) that, because the settlement bar in Section 113(f)(2) provides protection only against "claims for contribution *regarding matters addressed in the settlement*," 42 U.S.C. 9613(f)(2) (emphasis added), it protects only against claims by PRPs that have reimbursed some portion of the *government's* costs and not against claims by PRPs that incurred response costs of their own. As respondent seemingly recognizes (Br. 37), however, whether an action for cost recovery implicates "matters addressed in the settlement" turns on the terms of the settlement agreement itself, and courts have upheld settlement agreements that protect settling defendants from contribution claims for response actions being performed by other PRPs. See, *e.g.*, *United States* v. *BP Amoco Oil PLC*, 277 F.3d 1012, 1015, 1020-1021 (8th Cir.), cert. denied, 537 U.S. 942 (2002); *United States* v. *Davis*, 261 F.3d 1, 27-28 (1st Cir. 2001); *United States* v. *Southeastern Pa. Transp. Auth.*, 235 F.3d 817, 822-823 (3d Cir. 2000).

its major limitation. Statutory construction simply does not work that way. Respondent's effort merely confirms that allowing private PRPs to pursue actions against settling PRPs would create incentives not only for would-be plaintiff PRPs not to settle with the government (so as to preserve their right to sue settling PRPs), but also for would-be defendant PRPs not to settle (because a settling PRP could still be sued by another PRP).[8]

The Court should see respondent's proposed statutory rewrites for what they are: *viz.*, an effort to create a shadow contribution scheme under Section 107(a)(1)-(4)(B) for PRPs that cannot satisfy Section 113(f)'s suit-or-settlement requirement. "There is no reason why Congress would bother to specify conditions under which a person may bring a contribution claim, and at the same time allow [the precise equivalent of] contribution actions absent those conditions." *Cooper Industries*, 543 U.S. at 166.

2. Respondent and its amici suggest that, in enacting CERCLA and SARA, Congress intended to encourage voluntary cleanups of contaminated sites. That is undoubtedly true, but it does not follow that Congress intended to promote unsupervised cleanups *at the expense of* government-supervised cleanups pursuant to settlement or suit. Indeed, the legislative history on which they rely actually confirms that Congress sought to encourage voluntary cleanups pursuant to settlements with the government. Thus, respondent cites (Br. 26) Senator Domenici's statement concerning the importance of encouraging "voluntary cleanup actions," 131 Cong. Rec. 24,730 (1985), but omits the very next sentence, which makes clear that he was referring to voluntary *settlement agree-*

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[8] As a theoretical matter, of course, settling PRPs remain subject to actions for cost recovery by "innocent" private parties under Section 107(a)(1)-(4)(B) and by non-settling sovereigns under Section 107(a)(1)-(4)(A). In practice, however, the prospect of such actions is likely to be a much smaller deterrent to settlement than the prospect of actions by other PRPs.

ments with the government. See *id.* at 24,731 (explaining that, "[u]nder [SARA], the President would be authorized to enter into agreements with potentially responsible parties to conduct remedial actions"). Similarly, amici Browner et al. cite (Br. 6) Representative Lent's reference to "a key groundbreaking structural reform [in SARA] that will encourage responsible parties to come forward and take responsibility for cleaning up the toxic waste sites they helped create," 131 Cong. Rec. 16,573 (1985), but omit the very next sentence, which makes clear that the "reform" at issue was designed to encourage *settlements* with the government. See *ibid.* (noting that, "[i]n this bill, we have provided the EPA administrator with additional authority to expedite settlements * * * so that responsible parties will no longer 'hide in the weeds' and avoid their responsibility to safeguard the public health and safety").

SARA was no doubt motivated by concerns that PRPs were resisting EPA's cleanup demands, necessitating costly and time-consuming litigation. But Congress addressed that concern by creating incentives for PRPs to enter into settlements with the government. There is no evidence in the legislative history of either CERCLA or SARA that suggests that Congress intended to allow PRPs to bring suit under Section 107(a) despite the very real danger that such suits would undermine the government-enforcement and settlement regime established by those statutes.

3. Private PRPs retain considerable incentives to engage in cleanups notwithstanding their inability to sue under Section 107(a). See U.S. Br. 43. And where a private PRP incurs substantial response costs and then enters into a settlement with the federal or state government (and where the PRP can identify other solvent PRPs with respect to the same facility), the PRP will generally be able to recover an allocated share of its costs by bringing an action for contribution under Section 113(f)(3)(B).

Respondent's amici suggest that, where EPA compels a PRP to undertake a response action by means of an administrative order under Section 106, the PRP would be unable to seek contribution from other PRPs, because the administrative order would not constitute a "civil action" for purposes of Section 113(f)(1). But a PRP threatened with issuance of a Section 106 order has two options, either of which may entitle it to seek contribution. If the PRP has no objection to the proposed response action, it can agree with EPA to enter into a consent order, and EPA has indicated that it will generally include language in such an order that would render it a "settlement" for purposes of Section 113(f)(3)(B).[9] On the other hand, if the PRP objects to the order, it can refuse to comply, whereupon the United States could bring suit under Section 106(b)(1) or Section 107(a)(1)-(4)(A) (and thereby trigger the right to seek contribution under Section 113(f)(1)).

Amicus Consolidated Edison also suggests (Br. 4-5) that, under the government's interpretation of Section 107(a)(1)-(4)(B), a PRP would have no incentive to settle with a State, because the State would somehow be disabled from entering into a qualifying settlement under Section 113(f)(3)(B). It is hard to see why that is so. While there are various open questions concerning precisely what a State must do in order to enter into a qualifying settlement, a State *could* do so by, at a minimum, making clear in the settlement that it was releasing its claim for response costs under CERCLA. Notably, the amici States do not embrace Consolidated Edison's view, but instead complain only that they would have to divert their attention from other cleanups upon receiving requests to enter into settlements at other sites. See States Br. 26-28. That

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[9] See Memorandum from Susan E. Bromm, Director, Office of Site Remediation Enforcement, EPA, and Bruce S. Gelber, Chief, Environmental Enforcement Section, Environment and Natural Resources Division, Department of Justice at 2 (Aug. 3, 2005) <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-rev-aoc-mod-mem.pdf>.

concern is overstated, however, given that States can and do require parties to reimburse the administrative costs incurred by States in entering into settlements. Moreover, many States have established EPA-approved voluntary cleanup programs in which they commit to ensure that such cleanups will be conducted in accordance with federal law. See EPA, *Memoranda of Agreement (MOAs) on State Voluntary Cleanup Programs (VCPs)* (Dec. 22, 2006) <www.epa.gov/brownfields/html-doc/statemoa.htm>. There is no obvious reason why States could not enter into settlement agreements with private parties that satisfy the terms of those programs.

Wholly apart from any incentives to settle in order to trigger a federal contribution remedy, PRPs also have powerful incentives to settle with States because virtually all States can also pursue PRPs under state law (which often enables PRPs to obtain contribution from other PRPs as well). See, *e.g.*, Environmental Law Institute, *An Analysis of State Superfund Programs: 50 State Study* 7-9, 31-35, 53-57, 139-279 (1998) (listing state statutes) <www.elistore.org/reports_detail.asp?ID=436>; Ark. Code Ann. §§ 8-7-501 *et seq.* (2000). Thus, the government's interpretation of Section 107(a)(1)-(4)(B) leaves PRPs with considerable incentive and opportunity to enter into settlements with States, and to engage in cleanups more generally.

4. Finally, respondent renews the contention (Br. 26-27) that, when federal PRPs are subject to liability, EPA would forgo enforcement action (and thus insulate those PRPs from liability for contribution). Respondent, however, does not dispute the proposition that EPA has repeatedly taken enforcement action in those circumstances.[10] Respondent's

[10] Respondent's amici contend that the government broke off settlement negotiations in this case and in *E.I. du Pont de Nemours & Co.* v. *United States*, 460 F.3d 515 (3d Cir. 2006), petition for cert. pending, No. 06-726 (filed Nov. 21, 2006), in the wake of this Court's decision in *Cooper Industries*. But the plaintiff PRPs were not negotiating with EPA to resolve their own cleanup liability; rather, they were merely seeking monetary relief from federal PRPs.

amici unwittingly confirm that proposition when they cite statements by EPA officials indicating their commitment to ensuring that the government abides by its obligations under CERCLA. See Browner Br. 16-17. Although the United States does not bring actions against itself in federal court, it routinely exposes itself to liability by pursuing enforcement action against private PRPs, and can also be subjected to liability when state or tribal authorities or "innocent" private parties take action themselves against PRPs.

The government's waiver of sovereign immunity in Section 120(a)(1) likewise provides no support for respondent's position. That waiver merely imposes liability on federal PRPs "to the same extent" as private parties; it does not define the class of permissible plaintiffs under Section 107(a) (or, for that matter, any other provision of CERCLA). The argument that SARA's waiver of sovereign immunity justifies reading into Section 107(a) a broad right of cost recovery against governmental and private PRPs alike is thus a non sequitur. Like all of the other policy arguments advanced by respondent and its amici, it should be rejected with leave to renew it before Congress, to which it is more properly directed.

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

APRIL 2007

Any "refusal" by the government to settle on those terms was understandable in light of the fact that, in the government's view, the plaintiff PRPs have no cause of action absent resolution of their own liability.

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35pgs

No. 06-562

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF CALIFORNIA WATER AGENCIES, NATIONAL ASSOCIATION OF WATER COMPANIES, CALIFORNIA WATER ASSOCIATION, CALIFORNIA STATE ASSOCIATION OF COUNTIES, CASTAIC LAKE WATER AGENCY, SAN GABRIEL BASIN WATER QUALITY AUTHORITY, AND MAIN SAN GABRIEL BASIN WATERMASTER IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

The *amici curiae* are associations of public agencies, publicly regulated water utilities, and individual public agencies that – either directly or indirectly – manage water supplies and provide water to other water agencies or end users. The *amici* or their members are involved, or may become involved, in efforts to clean up groundwater resources contaminated by hazardous substances. A number of the *amici* or their members are involved in litigation under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in conjunction with their respective roles in the management of water supplies and provision of water to other water agencies or end users.

The *amici* are as follows:

The Association of California Water Agencies is an association with a membership of 450 public water agencies. Member agencies are collectively responsible for 90 percent of the water delivered to cities, farms, and businesses in California.

The National Association of Water Companies (NAWC) represents all aspects of the private water service industry. NAWC members own regulated drinking water and wastewater utilities, are party to public-private partnerships, and have management contract arrangements.

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

The California Water Association (CWA) represents the interests of approximately 140 investor-owned water utilities that are regulated by the California Public Utilities Commission. CWA members provide water utility services to nearly six million people throughout California.

The California State Association of Counties represents all 58 county governments in California before the California Legislature, administrative agencies, and the federal government.

Castaic Lake Water Agency (CLWA) is a public water agency that serves an area of 195 square miles in Los Angeles and Ventura Counties. CLWA supplements local groundwater supplies with State Water Project water from northern California and provides water to the Santa Clarita Valley through four purveyors: Los Angeles County Water District #36, Newhall County Water District, CLWA Santa Clarita Water Division, and Valencia Water Company. As a result of the detection of perchlorate contamination in its groundwater wells, CLWA has incurred response costs and is engaged in litigation to recover those response costs.

The San Gabriel Basin Water Quality Authority (WQA) is a political subdivision of the State of California. The Legislature created WQA to protect the public health and safety by planning, financing, constructing and/or operating groundwater extraction and treatment projects to be carried out in the San Gabriel basin, to provide potable water for beneficial uses in the basin, and to contribute to the basin-wide remedial objectives established by state and federal agencies. WQA has incurred response costs to treat and remediate the contaminated groundwater in the San Gabriel basin, and has sued

parties responsible for the contamination to recover such costs.

The Main San Gabriel Basin Watermaster is the agency charged with administering adjudicated water rights and managing groundwater resources within the watershed and groundwater basin known as the Main San Gabriel Basin. The Watermaster was created in 1973 by the California Superior Court of Los Angeles County to administer the Basin's adjudicated water rights and to provide a basin-wide governing body for management of water resources.

SUMMARY OF ARGUMENT

Section 107(a) of CERCLA creates a right of action that is available to any person other than the United States, a State, or an Indian tribe against responsible parties for necessary costs of response incurred consistent with the National Contingency Plan (NCP). The text of section 107(a) resolves the issue before the Court. In any event, the availability of a broad right of action under section 107(a) furthers the public interest by allowing water purveyors to clean up contaminated groundwater resources and then recover cleanup costs from polluters.

A. Section 107(a)(1)-(4)(B) states that covered persons that are unable to invoke an affirmative defense set forth in section 107(b) shall be liable for necessary costs of response incurred by "any other person" consistent with the NCP. The phrase "any other person" refers to any person other than those persons referred to in section 107(a)(1)-(4)(A), that is, the United States, a State, or an Indian tribe. This interpretation is consistent with lower

court precedent, the position advanced by the United States until the Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), and relevant rules of grammar. Furthermore, Congress did not affect the scope of the remedy in section 107(a)(1)-(4) when it amended CERCLA in 1986 and added section 113(f)(1).

B. The right of action contained in section 107(a) serves the public interest by allowing water purveyors to clean up contaminated groundwater resources and then seek to recover their cleanup costs from polluters. Groundwater is a critical resource in California and elsewhere, and groundwater contamination is a significant, widespread problem. Water purveyors play an important role in the cleanup of groundwater contamination; they frequently are both the first responders to groundwater contamination and the parties expected to establish and oversee cleanup efforts with limited federal or state involvement. Although water purveyors may be adjudged innocent parties when they seek to recover response costs, polluters have argued that water purveyors contribute to contamination because, *inter alia*, they own and operate wells. A broad right of action will allow water purveyors to focus on their roles as first responders and their mission of providing water of sufficient quantity and quality to their customers without fear that cleanup costs incurred cannot be recouped from polluters.

ARGUMENT

THE LOWER COURT PROPERLY INTERPRETS SECTION 107(a) OF CERCLA TO PROVIDE A RIGHT OF ACTION TO SO-CALLED RESPONSIBLE PARTIES

A. Section 107(a)(1)-(4)(B) Creates a Right of Action that Is Available to Any Person Other than the United States, a State, or an Indian Tribe

This Court has made plain that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Accord *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (holding that "when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms"). The language of section 107(a) of CERCLA is clear on its face; it creates a right of action that is available to any person other than the United States, a State, or an Indian tribe in certain prescribed circumstances.

Section 107(a) of CERCLA provides rights of action to certain specified parties under certain circumstances. Section 107(a) states, *inter alia*, as follows:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section –
>
> (1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, *shall be liable for* –

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) *any other necessary costs of response incurred by any other person* consistent with the national contingency plan . . .

42 U.S.C. § 9607(a)(1)-(4)(A) & (B) (emphasis added).

The phrase "any other person" included in section 107(a)(1)-(4)(B) plainly encompasses so-called responsible parties.[2] In context, there is no question that the modifier

[2] The terms "potentially responsible party" and "PRP" are not used herein because they may be misunderstood; whereas in plain English

(Continued on following page)

"other" refers to *any person* other than those persons referred to in section 107(a)(1)-(4)(A), that is, the United States, a State, or an Indian tribe. This interpretation, which relies on the language of the statute itself, is consistent with Court of Appeal precedent.[3] Moreover, prior to this Court's decision in *Aviall*, the United States consistently advanced this same interpretation in this Court.[4]

The word "other" is used in the same section of CERCLA to modify the term "any [] necessary costs of response." 42 U.S.C. § 9607(a)(1)-(4)(B). Just as the phrase

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they connote culpability, in the CERCLA context they do not necessarily do so. *E.g.*, *Consolidated Edison Company of New York, Inc. v. UGI Utilities, Inc.*, 423 F.3d 90, 97 n.8 (2d Cir. 2005). Instead, the term responsible party is used to describe persons covered by section 107(a)(1)-(4).

[3] See, *e.g.*, *Atlantic Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 1144 (Jan. 19, 2007) ("We have held that 'any other person' means any person other than the statutorily enumerated 'United States Government or a State or an Indian tribe.'" (citing *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 936 n. 9 (8th Cir. 1995))); *Consolidated Edison Company of New York, Inc. v. UGI Utilities, Inc.*, 423 F.3d 90, 99 (2d Cir. 2005) ("Section 107(a) makes its cost recovery remedy available, in quite simple language, to *any* person that has incurred necessary costs of response, and nowhere does the plain language of *section 107(a)* require that the party seeking necessary costs of response be innocent of wrongdoing." (emphasis in original)); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) ("Under the literal language of § 107, the Pinal Group, as a PRP, is partly responsible for its cleanup costs and as 'any other person' under § 107, can also hold other PRPs liable for a portion of those same costs.").

[4] See, *e.g.*, Amicus Brief for the United States at 20-21, *Cooper Industries, Inc. v. Aviall Services., Inc.*, 543 U.S. 157 (2004) ("Section 107(a)(1)-(4)(B)'s reference to 'any person' is broad enough to allow one jointly liable party to sue another for the former's response costs"); Amicus Brief for the United States at 10, 14, *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (same).

"any other person" refers to section 107(a)(1)-(4)(A), the phrase "any other . . . costs" refers to section 107(a)(1)-(4)(A). See, *e.g.*, *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 891 (9th Cir. 1986) ("The word 'other' . . . reasonably functions to distinguish between government response costs in part (A) and private response costs in part (B)."). [5] It would be incongruous to interpret the two phrases differently.

Nonetheless, the United States now contends that the phrase "any other person" in section 107(a)(1)-(4)(B) does not refer to any person other than those referred to in section 107(a)(1)-(4)(A). Instead, the United States advances the novel argument that the phrase "any other person" in section 107(a)(1)-(4)(B) refers to any person other than those referred to in section 107(a)(1)-(4). See Brief for the United States at 15, *Atlantic Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 1144 (Jan. 19, 2007). This argument is contrary to basic rules of grammar. Where, as here, the apposite phrase may refer either to the immediately preceding phrase or to a phrase that appears earlier in the sentence, rules of grammar provide that the apposite phrase refers to the immediately preceding phrase. See William Strunk, Jr. & E.B. White, *The Elements of Style* 28 (4th ed. 2000) ("The position of words in a sentence is the principal

[5] The United States agrees with the interpretation of the phrase "any other necessary costs of response" articulated herein. See Brief for the United States at 20, *Atlantic Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 1144 (Jan. 19, 2007) ("Section 107(a)(1)-(4)(B) permits recovery only for 'any other necessary costs of response . . . consistent with the national contingency plan' – *i.e.*, costs other than the government's costs as specified in Section 107(a)(1)-(4)(A).").

means of showing their relationship. . . . The writer must, therefore, bring together the words and groups of words that are related in thought and keep apart those that are not so related.").

B. Section 113(f)(1) Does Not Affect the Scope of the Right of Action Provided by Section 107(a)(1)-(4)(B)

When Congress amended CERCLA in 1986 (via the Superfund Amendments and Reauthorization Act or SARA, Pub. L. No. 99-499, 100 Stat. 1616) and added section 113(f)(1), 42 U.S.C. § 9613(f)(1), it neither reduced nor expanded the class of persons that have a right of action under section 107(a)(1)-(4)(B), 42 U.S.C. § 9607(a)(1)-(4)(B). Section 113(f)(1) states, as follows:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C. § 9613(f)(1). Section 113(f)(1) does not, by its express terms, extinguish the availability of a right of action under section 107(a)(1)-(4)(B) to any person or persons.

Furthermore, this Court has established a strong presumption against implied repeals.[6] Nevertheless, the United States argues that, by implication, section 113(f)(1) extinguishes the availability of a right of action under section 107(a)(1)-(4)(B) to persons who are responsible parties (*i.e.*, to persons that fall within section 107(a)(1)-(4) of CERCLA) and who have not been sued under section 106 or 107(a) of CERCLA.[7] Brief for the United States at 26, *Atlantic Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006), *cert. granted,* 127 S. Ct. 1144 (Jan. 19, 2007) (stating that section 113(f)(1) "delineates the exclusive circumstances under which one private PRP may bring a suit against another under CERCLA"). The United

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[6] *Morton v. Mancari*, 417 U.S. 535, 549-50 (1974) (noting the cardinal rule that repeals by implication are not favored and stating that "the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable" (citation omitted)); see also *Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion) ("We have repeatedly stated . . . that absent a clearly established congressional intention, repeals by implication are not favored. An implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." (internal quotation marks and citations omitted)).

[7] In support of this argument, the United States cites *United States v. Fausto*, 484 U.S. 439 (1988), in which this Court held that the Civil Service Reform Act ("CSRA") precludes judicial review of personnel actions based on the Back Pay Act. But *Fausto* is readily distinguishable from the present matter on two grounds. First, whereas the CSRA is a comprehensive statute that overhauls the entire civil service system including the process for reviewing personnel action taken, *Fausto*, 484 U.S. at 443, 455, SARA is a set of specific, tailored amendments to CERCLA. Second, whereas this Court held that the CSRA does not repeal the Back Pay Act and only affects the judicial interpretation of that Act, the United States is asking this Court to alter the text of section 107(a)(1)-(4)(B) and thereby repeal that provision to the extent it provides a right of action to responsible parties.

States fails to provide sufficient grounds to depart from the language of the statute and well-established canons of interpretation.

In light of the plain language of CERCLA, there is no need to consult the legislative history. See, *e.g.*, *Lamie v. United States Trustee*, 540 U.S. at 534, 539. But the legislative history of section 113(f) of CERCLA clarifies that Congress did not intend to limit the scope of the right of action set forth in section 107(a)(1)-(4)(B). Instead, Congress sought to confirm the availability of a right of action in the nature of contribution to defendants in CERCLA actions and persons that settle with the Environmental Protection Agency (EPA) or a State. See, *e.g.*, S. Rep. No. 99-11, at 43 (1985) (indicating that section 113(f)(1) "clarifies and confirms existing law governing liability of potentially responsible parties"); H.R. Rep. No. 99-253, pt. I, at 79 (1985) (indicating that section 113(f)(1) "clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties."); 131 Cong. Rec. 34,645 (Dec. 5, 1985) (indicating that section 113(f)(1) "simply clarifies and emphasizes that persons who settle with EPA (and who are therefore not sued), as well as defendants in CERCLA actions, have a right to seek contribution from other potentially responsible parties."). There was consensus in Congress regarding the availability of a right of action under section 107(a)(1)-(4)(B); the legislative history demonstrates Congressional desire to confirm that remedy through enactment of section 113(f)(1). There is no basis for a claim that, by enacting section 113(f)(1), Congress sought to reduce the class of persons that have a right of action under section 107(a)(1)-(4)(B).

THE BROAD RIGHT OF ACTION IN SECTION 107(a) SERVES THE PUBLIC INTEREST BY ALLOWING PUBLIC AND PRIVATE WATER MANAGERS AND PROVIDERS TO CLEAN UP CONTAMINATED GROUNDWATER RESOURCES AND THEN RECOVER CLEANUP COSTS FROM POLLUTERS

Water is the natural resource that has had the most significant influence on the growth of the State of California for more than a century. The importance of surface water supplies is widely understood due to well-known political and economic battles over such supplies, for example, the controversy stemming from the damming of the Hetch Hetchy Valley in Yosemite National Park in the early 20th century to provide water to San Francisco. See Roderick Frazier Nash, *Wilderness and the American Mind* 161-181 (4th ed. 2001). Groundwater supplies also are critical to the vitality of the State and are the source of approximately 30 percent of average annual water deliveries in California. State Water Resources Control Board, *Report to the Governor and Legislature: A Comprehensive Groundwater Quality Monitoring Program for California* 1 (2003); California Department of Water Resources, *The California Water Plan Update Bulletin 160-98* at ES3-5 (1998).

Of course, the importance of water is not limited to California or to the western United States for that matter. But consciousness of the dependence on water is heightened in California and other western states because of the magnitude of the demand for water coupled with the disjuncture between the loci of available supplies and the loci of consumers. When layers of complexity – such as species recovery efforts, long-term sustenance of groundwater aquifers, and climate change – are brought to the

forefront, it should not be difficult to understand why Westerners are concerned about their water.

A multitude of public and private entities are involved in the management of water supplies and provision of water to other water agencies or end users. *Amici* are leading representatives of those entities. Most public and private water managers and providers in California were established to secure adequate water supplies and ensure sufficient water quality to meet the demands of their constituents or customers. Over the past 25 years, a substantial number of those managers have also been forced to address contamination of water supplies, specifically groundwater contamination, to secure continued adequate and safe water supplies for their constituents or customers.

A. Groundwater Contamination Is a Significant, Widespread Problem

Groundwater contamination is a pervasive problem in California. *E.g.*, Anthony Saracino & Harrison Phipps, *Groundwater Contaminants and Contaminant Sources* 1 (Cal. Dept. of Health Services 2002) (indicating that more than 4,000 public water wells in California were taken out of service due to groundwater contamination between 1984 and 2001); Alex N. Helperin et al., *California's Contaminated Groundwater* viii (Natural Resources Defense Council 2001). Statewide, between 5 and 42 percent of existing public water supply wells sampled exceed one or more drinking water standards. California Department of Water Resources, *California Water Plan Update 2005* at 4-1537 (2005).

In addition to the fact that instances of contamination are commonplace, a number of groundwater basins that provide important water sources for populated areas are plagued by significant contamination. For example, the San Gabriel groundwater basin, which is located approximately 10 miles east of Los Angeles and provides water for more than 1,000,000 residents, is included on the Environmental Protection Agency's National Priorities List (NPL) of high priority contaminated sites.[8] Numerous chemicals contaminate the San Gabriel basin, and the area of contamination covers more than 30 square miles.[9]

B. Public Water Agencies and Publicly Regulated Water Utilities Play an Important Role in the Cleanup of Groundwater Contamination

Under the California Constitution and state statutes, public agencies must maximize the reasonable and beneficial use of available water resources.[10] Cal. Const. art. X,

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[8] 40 C.F.R. Pt. 300, App. B, Table 1; U.S. Environmental Protection Agency, San Gabriel Valley (All Areas), California, EPA ID# CAD980818579, available at http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/vWSOAlphabetic?OpenView.

[9] U.S. Environmental Protection Agency, Water, Water Everywhere . . . Finally a Drop to Drink, available at http://www.epa.gov/superfund/accomp/success/pdf/sangabriel.pdf.

[10] In addition, California law requires public water agencies to assess and verify their ability to meet projected water demand over a 20-year period. Cal. Water Code §§ 10910 *et seq.*; Cal. Gov't Code §§ 66493 *et seq.*; Cal. Water Code §§ 10610 *et seq.* California caselaw holds that, in meeting these obligations, public water agencies cannot rely on contaminated water sources. *Friends of the Santa Clara River v. Castaic Lake Water Agency*, 123 Cal. App. 4th 1 (2004) (invalidating an Urban Water Management Plan for not adequately addressing both the time needed to implement the available method for treating contaminated water and the reliability of the groundwater supply prior to

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§ 2; Cal. Water Code § 100. In addition, public water agencies and publicly regulated water utilities must meet federal and state drinking water requirements. See, *e.g.*, Safe Drinking Water Act, 42 U.S.C. §§ 300f-330j-26; California Safe Drinking Water Act, Cal. Health & Safety Code, §§ 116270-116293; Cal. Code Regs. tit. 22, §§ 64400-64483; Cal. Pub. Util. Code § 770. These federal and state legal requirements and the responsibility to provide safe and reliable water supplies to the public generally foreclose public agencies and utilities from waiting for a determination of liability before acting to protect water supplies. For this reason, public water agencies (and other regional or local public agencies) and utilities frequently assume responsibility to address groundwater contamination that threatens public water supplies or public health and safety more generally. Such agencies and utilities (collectively referred to as "water purveyors") often are both the first responders to groundwater contamination and the parties expected to establish and oversee cleanup efforts with limited federal or state involvement. This arrangement is sensible in light of the familiarity of water purveyors with the context in which they operate and their responsibilities to the public.

By acting to protect groundwater resources as well as public health and safety, water purveyors assume considerable risk that they will not be reimbursed for cleanup activities by those ultimately responsible for

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completion of treatment"); see also Cal. Water Code § 10634 ("The plan shall include information, to the extent practicable, relating to the quality of existing sources of water available to the supplier . . . and the manner in which water quality affects water management strategies and supply reliability.").

contamination. The availability of a broad right of action under section 107(a)(1)-(4)(B) of CERCLA is an important tool to address hazardous contamination and thereby limit the risk that water purveyors must accept when initiating response actions to clean up contaminated groundwater supplies.

For the most part, water purveyors, which manage water supplies and provide water to other water purveyors and end users, do not cause or contribute to groundwater contamination. For this reason, such water purveyors may be adjudged innocent parties that have a right of action under section 107(a)(1)-(4)(B) under the interpretation of that provision advanced by either party to this lawsuit. But parties that do cause or contribute to groundwater contamination (*i.e.*, polluters) have argued that water purveyors fall within the broad definition of responsible parties established by CERCLA. For example, polluters have argued that water purveyors are responsible parties because they operate wells that result in the migration of contamination.

The availability of a right of action under section 107(a)(1)-(4)(B) of CERCLA to water purveyors, irrespective of their status as innocent or responsible parties for the purposes of CERCLA, provides these water purveyors with a powerful tool to seek reimbursement for response costs incurred consistent with the National Consistency Plan (NCP), 40 C.F.R. Pt. 300. The availability of such a right of action also can function to bring polluters to the table to seek compromise regarding allocation of groundwater cleanup costs without resort to litigation.

C. EPA's Ability to Ensure the Cleanup of Contaminated Groundwater Is Constrained

Due to EPA's limited resources and the extent of hazardous contamination nationwide, EPA can only exercise oversight and take enforcement action with respect to an extremely small proportion of instances of hazardous contamination. There are an estimated 450,000 contaminated sites nationwide. S. Rep. No. 107-2 at 15 (2001). Fewer than 1250 of these 450,000 sites are NPL sites. 40 C.F.R. Pt. 300, App. B. Even with respect to NPL sites, such as the San Gabriel Groundwater Basin referenced above, EPA's role reflects its limited resources.

The role of water purveyors in addressing groundwater contamination is consistent with an underlying goal of CERCLA to facilitate cleanups with little or no Federal or State involvement. Their efforts also are consistent with the NCP, which includes an entire subpart regarding cleanup by persons other than governments. 40 C.F.R. § 300.700; see also 58 Fed. Reg. 54,702, 54,725 (Oct. 22, 1993) ("The focus of this subpart is on those authorities that allow persons other than governments to respond to releases and to recover necessary response costs."). Where water purveyors play a prominent role in cleanup of contaminated groundwater, EPA can husband its resources and minimize its involvement.

EPA has – at least as a practical matter – typically taken the position that water purveyors involved in cleanup of groundwater contamination are not responsible parties. As a result, EPA neither files administrative or judicial enforcement actions against water purveyors, nor enters into settlements with them that would trigger

section 113(f)(1) or (f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(1), (f)(3)(B).

D. Specific Cases Are Representative of the Larger Problem

1. The Castaic Lake Litigation

In 1997, four public and private water purveyors to the north of Los Angeles discovered perchlorate contamination in the groundwater wells used to supply drinking water to their customers. The water purveyors shut down those wells due to the contamination, which limited the ability of those purveyors to provide drinking water to their customers. At the same time, the water purveyors took action to address the groundwater contamination. Though EPA was notified of the contamination, to date EPA has not overseen the cleanup effort. California, through the Department of Toxic Substances Control (DTSC), has exercised oversight. In 2003, the water purveyors entered into an Environmental Oversight Agreement with DTSC to ensure that the remediation is consistent with the NCP.

The water purveyors contended that the source of the contamination was the former Whittaker Bermite facility located in Santa Clarita, California. The Whittaker Bermite facility covers approximately 1,000 acres and was formerly owned by Whittaker Corporation. Whittaker – a defense-based industrial corporation – manufactured ammunition, flares, detonators, and related explosive products from at least 1943 to 1987.

The water purveyors affected by the contamination – CLWA, Newhall County Water District, Santa Clarita Water Company and Valencia Water Company – filed a

complaint in the United States District Court for the Central District of California against Whittaker and the current owners and operators of the Whittaker Bermite facility, that is, Santa Clarita LLC and Remediation Financial, Inc. (collectively "Whittaker").[11] The water purveyors assert that hazardous substances released from the Whittaker Bermite facility contaminated their water production wells.

Whittaker filed a counter-claim against the water purveyors. In its counter-claim, Whittaker argued that the water purveyors are liable for contribution because they owned groundwater wells that are "facilities" as defined by CERCLA. Because hazardous substances passively migrated to the water purveyors' wells, Whittaker argued that a release occurred at those wells for purposes of determining CERCLA liability.

In July 2002, the water purveyors moved the court for partial summary judgment to establish Whittaker's liability for response costs under CERCLA. At the same time, Whittaker moved the Court to establish the water purveyors' liability under CERCLA. In July 2003, the district court granted in part the water purveyors' motion. The court ruled that Whittaker is liable for the response costs incurred by the water purveyors that are necessary and consistent with the NCP. *Castaic Lake Water Agency v. Whittaker Corporation*, 272 F. Supp. 2d 1053, 1069 (C.D. Cal. 2003). At the same time, the court ruled that the water purveyors' groundwater wells are "facilities" as defined by CERCLA. *Id.* at 1077. Citing *ABB Industrial*

[11] Neither EPA nor the State of California has filed an enforcement action against the defendants in this action.

Systems, Inc. v. Prime Technology, Inc., 120 F.3d 351, 358 (2d Cir. 1977) and *United States v. CDMG Realty Co.*, 96 F.3d 706 (3d Cir. 1996), the court further concluded that the passive migration of contamination into the water purveyors' wells constituted a "release" within the meaning of 42 U.S.C. § 9601(22). *Id.*

This ruling exposes water purveyors to liability under CERCLA merely for owning groundwater wells used to supply drinking water to their customers. The ruling shifts the burden of proof to water purveyors, requiring them to prove they can invoke one of CERCLA's limited affirmative defenses, such as the innocent landowner defense. To establish this defense, the district court found that a water purveyor must prove: (1) that the release or threat of release of hazardous substances was caused solely by the acts of a third party, (2) that the third party was not an employee or agent of the water agency, and (3) that the water agency exercised due care with respect to the hazardous substances and took precautions against foreseeable third-party acts or omissions. *Castaic Lake Water Agency*, 272 F. Supp. 2d at 1079-80.

In *Castaic Lake Water Agency*, Whittaker argued that the water purveyors were not protected by the innocent landowner defense. In support of this argument, Whittaker asserted that, by pumping groundwater production wells, the water purveyors helped draw the contamination toward the wells. Whittaker further argued that the water purveyors should have "done more" to mitigate groundwater resource problems and taken greater care in the siting of their wells.

The district court ultimately concluded that the water purveyors presented evidence sufficient to create a genuine issue of fact as to whether the purveyors exercised due care, and whether the releases at their wells were caused solely by third party acts. *Id.* at 1080-83. In support of its conclusion, the district court found that the water agencies presented evidence that they had neither used the hazardous substances at issue nor had knowledge of the contamination at the time their wells were sited. These facts supported an inference that any releases at the wells were not foreseeable. *Id.* at 1082. The court also cited evidence presented showing that the effect of pumping from the wells was insignificant compared to the natural migration of contamination, which supports an inference either that the water agencies were not a "but for" cause of the releases or that their acts were "so indirect and insubstantial in the chain of events leading to the release" that the innocent landowner defense still should be available to them. *Id.*

Citing *Lincoln Properties, Ltd. v. Higgins*, 823 F. Supp. 1528, 1539 (E.D. Cal. 1992), the court concluded that, for purposes of CERCLA,

> "caused solely by" incorporates the concept of proximate or legal cause. If the defendant's release was not foreseeable, and if its conduct – including acts as well as omissions – was "so indirect and insubstantial" in the chain of events leading to the release, then the defendant's conduct was not the proximate cause of the release and the third party defense may be available.

Castaic Lake Water Agency, 272 F. Supp. 2d at 1082.

In addition, the district court noted that its ruling did not decide whether water purveyors' CERCLA claims are actually for cost recovery under section 107(a) or for

contribution under sections 107(a) and 113(f). *Castaic Lake Water Agency*, 272 F. Supp. 2d at 1069. In light of this Court's decision in *Aviall*, Whittaker filed a motion currently pending before the district court arguing that the water purveyors cannot pursue a section 107(a) claim.

The assertions set forth by Whittaker in *Castaic Lake Water Agency* illustrate the difficulties and challenges facing water agencies and utilities seeking to provide a safe and reliable water supply to their customers. Even though the water purveyors presented evidence that they never used the hazardous substances at issue and sited their production wells before knowledge of the contamination, they were still subject to counter-claims resulting in a finding that, for purposes of CERCLA, they owned facilities from which releases took place. This shifted the burden of proof to the water purveyors to establish the elements required by the innocent landowner defense.

2. The South El Monte Operable Unit Litigation

The San Gabriel groundwater basin provides drinking water to more than 1,000,000 residents of the San Gabriel Valley and nearby areas. These residents have no adequate alternative water supplies to groundwater from the basin. Thus, despite the widespread groundwater contamination in the basin, San Gabriel Valley residents must rely on this basin for their drinking water, including numerous water supply wells that draw water directly from contaminated portions of the basin. More than one-quarter of the more than 366 water supply wells in the San Gabriel basin draw contaminated groundwater.

In 1984, EPA added the San Gabriel groundwater basin to the NPL as four separate sites (collectively, SGV

Superfund Sites). 49 Fed. Reg. 19,480 (May 8, 1984). These sites include multiple areas of contaminated groundwater in the 170-square-mile San Gabriel Valley. EPA estimates that more than 30 square miles of groundwater in the San Gabriel groundwater basin may be contaminated, including groundwater found under the Cities of Alhambra, Arcadia, Azusa, Baldwin Park, Industry, El Monte, La Puente, Monrovia, Rosemead, South El Monte, and West Covina in Los Angeles County, California. EPA has further divided the four SGV Superfund Sites into various operable units, and each operable unit has its own remedy. One such unit is the South El Monte Operable Unit (SEMOU).

The SEMOU is an area of groundwater contamination that covers a surface area of approximately eight square miles in and near the Cities of South El Monte, Rosemead, and El Monte. The groundwater in the SEMOU is contaminated as a result of improper handling and/or disposal of various chemicals, including various volatile organic compounds (VOCs), chlorinated solvents, perchlorate, and 1,4-dioxane. From the 1940s through the 1980s, many industrial facilities in the SEMOU used VOCs and chlorinated solvents for degreasing, metal cleaning, and other purposes.

The groundwater contamination in the SEMOU has impacted numerous public water supply wells, which previously had the capacity to produce thousands of gallons per minute of potable water. The three water purveyors in the SEMOU – the City of Monterey Park (CMP), Golden State Water Company (GSWC), and San Gabriel Valley Water Company (SGVWC) – have had to shut down and/or add "wellhead treatment" facilities to many of their public water supply wells in the SEMOU.

These treatment facilities not only treat the groundwater so that the water purveyors may provide a safe and adequate water supply to their customers, but they also have come to serve as EPA's selected remedy for the SEMOU.

Between 1984 and 1998 – some 14 years – EPA conducted investigations and studies regarding the sources and extent of groundwater contamination in the SEMOU. In 1998, EPA released its Remedial Investigation (RI) Report for the SEMOU. A year later, EPA issued its Feasibility Study (FS) Report for the SEMOU that considered potential alternative remedies. In September 2000, EPA issued its Interim Record of Decision (IROD) for the SEMOU that selected a remedy. U.S. Environmental Protection Agency, Interim Record of Decision (Sept. 20, 2000). The IROD envisioned using "wellhead treatment" facilities at the water purveyors' existing public water supply wells to provide the remedy for the SEMOU.

During the next three years, EPA tried to reach settlements with the various parties responsible for the contamination in the SEMOU, to no avail. In August 2003 – almost 20 years after adding the SEMOU to the NPL – EPA issued its Unilateral Administrative Order (UAO) under section 106(a) of CERCLA, 42 U.S.C. § 9606(a), for the SEMOU, directing 41 responsible parties to perform the remedy. U.S. Environmental Protection Agency, Unilateral Administrative Order (Aug. 29, 2003). EPA did not name any of the SEMOU water entities in the UAO, as EPA does not consider them liable parties. Although EPA issued this UAO nearly four years ago, EPA has yet to commence a civil action against any responsible party and has not yet consummated any judicially-approved settlement with any responsible party.

While EPA was conducting its investigations and studies, the contamination continued to spread and necessitated multiple well closures in the SEMOU. The affected water purveyors had to act. So with the help of funding from the San Gabriel Basin Water Quality Authority (WQA), each of the water purveyors constructed treatment facilities to ensure that they could continue to supply safe and adequate water supplies to their customers:

1) CMP constructed VOC treatment facilities for at least seven of its wells, plus perchlorate treatment facilities for two of its wells.

2) GSWC constructed VOC treatment facilities for two of its wells, as well as temporary perchlorate treatment facilities for these wells.

3) SGVWC constructed VOC treatment facilities for two of its plants, each of which consists of multiple wells.

In addition to helping fund the above treatment facilities, WQA constructed and operated a temporary shallow barrier treatment facility to contain and treat VOCs and 1,4-dioxane in the shallow portion of the SEMOU aquifer in an effort to prevent this contamination from spreading into the Whittier Narrows Operable Unit of the SGV Superfund Sites. WQA is constructing another 1,4-dioxane treatment facility for the shallow portion of the SEMOU aquifer in an effort to keep this contaminant from spreading into drinking wells in the SEMOU.

To date, the SEMOU water entities have spent nearly $30,000,000 in response costs to ensure continued safe and adequate water supplies. But for the contamination of the groundwater caused by the recipients of EPA's UAO (and other industrial parties), the SEMOU water entities would

not have had to incur any of these costs. WQA has estimated that the total cost of the SEMOU remedy and certain additional "wellhead treatment" facilities needed to provide an adequate and safe drinking water supply will exceed $180,000,000.

In 2002, because the water entities needed funds to construct and operate their treatment facilities, they commenced the following federal actions to recover their past and future response costs: *San Gabriel Basin Water Quality Authority v. Aerojet-General Corp., et al.*, Case No. CV 02-4565 (C.D. Cal. Filed June 11, 2002); *City of Monterey Park v. Aerojet-General Corporation, et al.*, Case No. CV 02-5909 (C.D. Cal. Filed July 29, 2002); *Southern California Water Company v. Aerojet-General Corporation, et al.*, Case No. CV 02-6340 (C.D. Cal. Filed Aug. 14, 2002);[12] and *San Gabriel Valley Water Company v. Aerojet-General Corporation, et al.*, Case No. CV 02-6346 (C.D. Cal. Filed Aug. 14, 2002). In these lawsuits, the water entities seek, *inter alia*, to hold the responsible parties jointly and severally liable under section 107 of CERCLA, 42 U.S.C. § 9607. The defendants moved to dismiss the water purveyors' section 107 claims on the ground that the water purveyors themselves allegedly are responsible parties, and thus their claims are limited to contribution under section 113, 42 U.S.C. § 9613.[13] The district court – much like the district court in the Castaic Lake litigation discussed above – ruled that the water purveyors' wells that had been impacted by contaminated groundwater

[12] After this lawsuit was filed in 2002, Southern California Water Company changed its name to Golden State Water Company.

[13] The SEMOU defendants did not move to dismiss WQA's complaint and have not argued that WQA is a responsible party.

were CERCLA "facilities" and that as owners of these wells the water purveyors were "presumptive" responsible – though not necessarily liable – parties under section 107(a)(1). This ruling required the water purveyors to amend their complaints to affirmatively assert their own "innocence" and plead CERCLA affirmative defenses just to maintain their claims under CERCLA section 107(a), 42 U.S.C. § 9607(a).

Since *Aviall*, the SEMOU defendants have alleged that the water entities have no remedy at all under CERCLA because they have neither entered into a settlement with EPA nor been sued by EPA, notwithstanding the fact that EPA does not consider the water entities to be responsible parties. The defendants' reliance on *Aviall* has further complicated and prolonged the water entities' efforts to reach settlements under the auspices of a court-appointed settlement master (appointed in 2004), which process remains ongoing.

If this Court recognizes a broad right of action under section 107(a) it will: (1) continue to encourage water purveyors to take urgently needed response actions – particularly given the limited ability of EPA to direct cleanup efforts – by foreclosing the possibility that the water purveyors will have no remedy under CERCLA; (2) encourage settlements (one of the stated goals of CERCLA) to provide desperately needed funding to effectuate groundwater cleanup and provide adequate and safe potable water to residents; and (3) help ensure that the polluters – as distinguished from the water purveyors and their taxpayers and ratepayers – pay their fair share of the costs of necessary response actions.

CONCLUSION

For the foregoing reasons, the judgment of the lower court should be affirmed.

Respectfully submitted,

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April 2007

54 18pp 955a

SUPREME COURT, U.S.
FILED
APR 5 - 2007
OFFICE OF THE CLERK

(77)

No. 06-562

In the
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,
Respondent.

On Petition For A Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE AVIALL SERVICES, INC. IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

Amicus curiae Aviall Services, Inc., is a party in a case before the United States Court of Appeals for the Fifth Circuit: *Aviall Services, Inc. v. Cooper Industries, Inc.*, No. 06-10996 (5th Cir. docketed Sept. 18, 2006). The issue that Aviall intends to raise in that appeal is the very issue presented by petitioner United States of America in the present case before this Court. Both the United States and the respondent, Atlantic Research Corporation, have consented to Aviall's submission of this amicus brief, and those parties' written consent is submitted herewith.

Counsel for Aviall authored this brief in whole. No person or entity other than Aviall made a monetary contribution to preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Eighth Circuit held that persons who are themselves potential liable parties under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. §§ 9601-9675 (West 2005) (CERCLA), but who are not eligible to sue under section 113(f) of the Act, have a right of cost recovery under section 107 of the Act. The court held that this cause of action arises under the express language of section 107(a)(4)(B) or, alternatively, as an implied right of contribution. Aviall submits this brief in support of the court of appeals' conclusion that a right of cost recovery arises under the plain language of section 107(a)(4)(B).

Under CERCLA section 107(a), an enumerated group of potentially responsible parties (PRPs) are liable for response costs incurred by (A) the United States, states, or Indian tribes, or (B) "any other person." Since PRPs are themselves "persons" under the statute, the plain meaning of this provision is that an individual PRP is liable to the government entities or any other "person" – including other PRPs.

The word "other" in clause (B) simply acts to distinguish the persons eligible to sue under clause (B) from the class of government entities, themselves defined as persons, entitled to sue under clause (A). This construction is consistent with the structure of CERCLA since the government "persons" suing under clause (A) have a lighter burden of proof than the "other" persons that must sue under clause (B).

The legislative history of CERCLA supports this construction. The amendments that inserted the word "other" in clause (B) also added "United States" to the definition of "person." Thus, the reference to "other" person can be seen as a simple drafting revision necessitated by the inclusion of the United States within the class of "persons." Nothing in the legislative history indicates that the inclusion of the word "other" was intended to fundamentally alter the scope of liability under CERCLA. Indeed, in the first twenty-five years following adoption of CERCLA, no court construed section 107(a)(4)(B) to exclude PRPs, and the Government indeed cites no case law supporting its construction of the statute.

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 107(A)(4)(B) AUTHORIZES COST RECOVERY BY ANY PERSON OTHER THAN CERTAIN GOVERNMENT ENTITIES.

CERCLA section 107 provides that an enumerated list of persons described in subsection 107(a)(1)-(4)—persons usually referred to as "potentially responsible parties" or "PRPs"—shall be liable for:

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan.

42 U.S.C.A. § 9607(a)(4) (West 2005). The question in this case is whether the "other person" referred to in subsection (B) above can be a person who is a PRP. The Government concedes that, but for the inclusion of the word "other" in the phrase "any other person," section 107(a)(4)(B) would "unambiguously" authorize a cause of action by a PRP. Brief for the United States at 19. Thus, the Government's entire argument hinges on their interpretation of this word.

The Government argues that the word "other" in the phrase "any other person" in subsection (B) distinguishes those persons authorized to seek cost recovery from "the universe of persons who fall into the four categories enumerated in Section 107(a)(1)-(4)." Brief for the United States at 15. In other words,

the Government would rewrite section 107(a)(4)(B) to provide a right of cost recovery "to any person other than a PRP." The Government says this interpretation is the "most natural reading" of section 107(a). Brief for the United States at 15.

But the Government's reading is actually quite "unnatural" and is inconsistent with the plain language of this section. On its face, section 107(a)(4)(B) provides that a PRP is liable to "any other person." "Person" is broadly defined in CERCLA section 101 to include, among others, individuals, corporations, the United States government, and a state. *See* 42 U.S.C.A. § 9601(21) (West 2005).[1] Thus, section 107(a)(4)(B) simply provides that those persons who are PRPs are liable to any other "individual, firm, corporation," etc., who has properly incurred response costs.

Furthermore, the most natural construction of the reference to "other" persons in section 107(a)(4)(B) is to distinguish the "persons" with a right of cost recovery under subsection (B) from the government entities with a right of cost recovery under subsection (A). Indeed, the statute's language compels this construction. The

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[1] Section 101(21) defines ``person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C.A. § 9601(21) (West 2005).

Although this definition does not expressly include "Indian tribes," other provisions of CERCLA refer to Indian tribes as "persons." *See, e.g.*, 42 U.S.C.A. § 9607(i), (j) (West 2005). The reference to "Indian tribes" in the class of government entities in section 107(a)(4)(A), was added by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 207(c)(1), 1986 U.S.C.C.A.N. (100 Stat.) 1613, 1705.

governmental entities specified in (A), including the United States and the states, are specifically defined as "persons" in section 101 of the Act. Therefore, it is necessary to distinguish between those "persons" (government entities) who may bring a lawsuit under subsection (A) from all "other" persons who may bring a lawsuit under subsection (B). In short, subsection 107(a)(4)(A) establishes liability to Person A (the United States) and to Person B (a State or Tribal authority), while subsection 107(a)(4)(B) establishes liability to "any other person."

Such a construction is consistent with the structure of CERCLA. Under subsection (A), the government entities are entitled to recover their response costs if those costs are "not inconsistent" with the national contingency plan ("NCP"). In contrast, under subsection (B) all persons other than government entities are entitled to recover their response costs only if those costs are "consistent" with the NCP.

This difference in language has significant consequences. For government cost recovery under subsection (A), the burden of proof is on the defendant to show that the government costs were not consistent with the NCP. For cost recovery by all other parties, the burden of proof is on the plaintiff to show their costs were consistent with the NCP. *See, e.g., United States v. E.I. DuPont De Nemours & Co.*, 432 F.3d 161, 178 (3d Cir. 2005) (en banc); *Washington State Dep't of Transp. v. Washington Natural Gas Co.*, 59 F.3d 793, 799-800 (9th Cir. 1995). Thus, Congress imposed a lighter burden for cost recovery by government entities than they did for "other persons."

This construction of the phrase "other person" is adopted by the Seventh Circuit in *Metropolitan Water*

Reclamation District of Greater Chicago v. North American Galvanizing and Coatings, Inc., 473 F.3d 824, 835 (7th Cir. 2007) (reading "other" as distinguishing "any other person" from the United States, a state, or an Indian tribe as listed in preceding subsection (A)); the Second Circuit in *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.*, 423 F.3d 90 (2d Cir. 2005), *pet. for cert. pending*, No. 05-1323 (U.S. filed Apr. 14, 2006); and the Eighth Circuit, *Atlantic Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 1144 (U.S. Jan. 19, 2007).

The Government, however, claims that the language of section 107(a) "definitively forecloses" this obvious interpretation. Brief for the United States at 20. Under section 107(a)(4)(B), persons are entitled to recover "any other necessary costs of response . . ." The Government, quite properly, states that this refers to costs other than those incurred by the government entities specified in 107(a)(4)(A). The Government asserts that the reference to "other" costs would be superfluous if "other persons" were construed to refer to persons other than government entities.

That assertion artificially constricts the flexibility of the English language—even as used in Congressional legislation. It is hardly an odd construction to state that PRPs, in addition to being liable for certain costs incurred by government entities, are also liable for any "other" costs incurred by persons "other" than the government. This repetition of the word "other" raises no eyebrows; it is a sensible enough English sentence.

More important, the legislative history discussed below explains why both uses of the word "other" occur in section 107(a)(4)(B). *See infra* section II.

II. THE LEGISLATIVE HISTORY OF CERCLA SUPPORTS THIS CONSTRUCTION

The clear and straightforward construction of the phrase "any other person" in subsection 107(a)(4)(B) to include all persons other than the government entities specified in subsection 107(a)(4)(A) does not require resort to legislative history. Nonetheless, legislative history supports this construction.

The legislative history of CERCLA is confused, but certain aspects of this history are clear. Senate Bill 1480 in the 96th Congress was the U.S. Senate's vehicle for enactment of what ultimately became CERCLA. The original version of S. 1480 was replaced in its entirety by a version introduced by Senator Stafford and managed on the floor by Senator Randolph. *See* 126 Cong. Rec. S14988 (Nov. 24, 1980). This new version of S. 1480, called the "Stafford/Randolph" substitute, ultimately became the final version of CERCLA. 126 Cong. Rec. S15009 (Nov. 24, 1980); *see* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 21 (1982).

As the Government notes, the original version of S. 1480 authorized cost recovery by the United States Government or a State, and "any person." Brief for the United States at 18-19. Under section 4 of this original version, PRPs were liable for (a) certain costs incurred by "the United States or a State" or (b) "any other costs" incurred by "any person." *See* S. 1480, 96th Cong. § 4(a)(1)(B) (as reported by S. Fin. Comm., Nov. 18, 1980). The Government concedes that, pursuant to this language, PRPs "unambiguously" would have had a cause of action. Brief for the United States at 19.

Yet this language was subsequently amended, and, under the Stafford/Randolph substitute, PRPs were liable to the United States Government, or a State or any "other" person. The Government states that there is no explanation for this change in the legislative history, and it asserts that the "only plausible explanation" for insertion of the word "other" is to exclude PRPs from bringing suit under CERCLA.

The Government does not, however, fully describe the changes made by the Stafford/Randolph substitute. Under the original version of S. 1480 (the version which allowed cost recovery by the United States, a State or "any person") the definition of "person" did not include the United States.[2] The Stafford/Randolph substitute (as does CERCLA today) defined person to specifically include the United States. The "plausible" explanation is that, with the inclusion of the United States in the definition of persons, the addition of the word "other" was a simple drafting issue necessary to clarify that the persons eligible to sue under subsection

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[2] In the original version of S. 1480, the word "person" was defined by referring to the definition in section 502 of the Clean Water Act. *See* S. 1480, 96th Cong. § 2(2) (as reported by S. Fin. Comm., Nov. 18, 1980) ("the terms 'State', 'person', 'navigable waters', and 'territorial seas' shall have the meaning provided in section 502 of the Clean Water Act"). Then, as now, the definition of "person" in section 502 of the Clean Water Act did not include the United States. *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 502(5), 1972 U.S.C.C.A.N. (86 Stat. 816) 951, 1036 (renamed Clean Water Act of 1977, Pub. L. No. 95-217, 1977 U.S.C.C.A.N. (91 Stat.) 1566) (codified as amended at 33 U.S.C.A. § 1362(5) (West 2001)) (defining ``person" to mean "individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body").

(a)(4)(B) were different from the persons (now defined to include the United States) authorized to sue under subsection (a)(4)(A).[3]

In the Senate debate, Senator Randolph described major changes made by the Stafford/Randolph substitute. Among the changes, he mentions deletion of the "Federal cause of action for medical expenses or property or income loss." 126 Cong. Rec. 14964 (Nov. 24, 1980). Nowhere here or elsewhere in the legislative history is there any indication that the inclusion of the word "other" in the Stafford/Randolph substitute was intended to limit a right of cost recovery by PRPs that the Government admits would otherwise have "unambiguously" existed.

Nor would it be plausible for Congress to have fundamentally altered the scope of CERCLA through the otherwise unremarked inclusion of the word "other." As Justice Scalia has noted: "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *See Whitman v. American Trucking*, 532 U.S. 457, 469 (2001). Few elephants are larger than precluding PRPs from

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[3] This also explains why subsection 107(a)(4)(B) contains a reference to "other" costs. The original version of S. 1480 imposed liability for "any other costs" incurred by "by any person." *See* S. 1480, 96th Cong. § 4(a)(1)(B) (as reported by S. Fin. Comm., Nov. 18, 1980) (providing liability for "any other costs or expenses incurred by any person to remove a hazardous substance as the terms 'remove' or 'removal' are defined in section 311(a)(8) of the Clean Water Act"). Although the inclusion of the United States within the definition of "person" required the change to "any other person," there was no need to revise the existing reference to "any other costs."

seeking cost recovery following a proper cleanup; few mouseholes are tinier than the government's narrow reading of the word "other."[4]

III. The Government Provides No Authority For Its Construction of Subsection 107(a)(4)(B)

The Government argues that the word "other" excludes the class of PRPs from the persons who are otherwise eligible to bring a cost recovery action under section 107(a)(4)(B). The Government's entire "plain language" argument is contained in the syllogism that introduces their argument on this issue. According to the Government:

- PRPs, the universe of persons specified in section 107(a)(1)-(4), are liable to "any other person."
- PRPs are themselves a "person."
- Therefore, the phrase "any other person" excludes the "persons" that are the subject of the sentence.

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[4] In support of their construction of subsection 107(a)(4)(B), the Government cites a sentence from *Jama v. Immigration Services*, 543 U.S. 335, 343 n.3 (2005). Brief for the United States at 15. As discussed below, the statutory construction issues raised by *Jama* are different from those involved in this case, and *Jama* provides no support for their interpretation. Nonetheless, we do note that Justice Scalia rejected an argument that an amendment, inserting the word "another" in the phrase "another country," should be construed to have "momentous consequences." In *Jama* Justice Scalia concluded that other contemporaneous stylistic changes to the statute explained and minimized the significance of that specific change. Here, of course, other contemporaneous changes to CERCLA explain the insertion of the word "other" in the phrase "any other person."

See Brief for the United States at 15. The Government, of course, misstates the structure of section 107(a). Section 107(a) provides that PRPs are liable to both (A) persons who are government entities, and (B) any "other" person. The "other," as discussed above, quite clearly acts to distinguish the parties who can sue under (B) from those who can sue under (A).

But even if, as the Government mischaracterizes it, section 107 provided simply that a person who is a PRP is liable to "any other person," this would not support the leap of logic contained in the Government's "therefore." The obvious construction of such a phrase is that an individual PRP is liable to any other person - including other PRPs. The Government acknowledges the possibility of this construction, but it dismisses this argument with the claim that "the text of the statute" makes "all" PRPs, in the conjunctive, liable to "any other person." Brief for United States at 21 n.10.[5]

Section 107(a) does not, of course, state that "all" PRPs are liable to anyone. It specifies that an enumerated list of types of PRPs, linked in the conjunctive by "and," are liable. This use of the word

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[5] Only by somehow lumping all individuals who fall within the category of PRPs as a separate class of persons is the Government's argument even coherent. But if persons lose a right of cost recovery simply because they fall within the category of PRPs, the Government's reading produces absurd results. A corporation that owned some contaminated property (and thus fell within the category of PRPs) would lose a right of cost recovery relating to its cleanup of *other* properties that it had not contaminated. In other words, a person who was responsible for contamination at a site would not be liable under section 107(a)(4)(B) if the plaintiff happened to be a PRP at some other site elsewhere in the country. Nothing compels this odd construction.

"and" simply does not address the issue of whether individual PRPs are liable to "any other person," including other persons who are PRPs. Is the Government seriously suggesting that if the list of PRPs in section 107(a) were linked by the word "or," the scope of persons who could sue under section 107(a)(4)(B) would be fundamentally different?

In the twenty-five years following the adoption of section 107(a)(4)(B), not a single court held that the phrase "any other person" excludes PRPs.[6] Indeed, the Government provides only two citations in support of its remarkable "therefore." Curiously, these two cases, *Porto Rico Ry. Light & Power Co. v. Mor*, 253 U.S. 345 (1920), and *Jama v. Immigration Services*, 543 U.S. 335 (2005), reach conflicting conclusions on the simple question of whether a condition that is located at the end of a list of items should apply to all items on the list or only the last item. The sentences from the cases, plucked out of context by the Government, do not add support for the Government's position. The results in both of these cases are closely tied to the history and purpose of the specific statutes at issue. Neither case involves construction of statutes that are either syntactically or logically apt in interpreting CERCLA subsection 107(a)(4)(B).

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[6] Indeed, Aviall has not identified a single case in which this argument was even made before *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004).

CONCLUSION

Aviall Services, Inc., supports the position of the respondent, Atlantic Research Corporation, that this Court affirm the court of appeals' judgment.

Respectfully submitted,

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No. 06-562

IN THE
Supreme Court of the United States

United States of America,
Petitioner,

v.

Atlantic Research Corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE UNITED STATES CONFERENCE OF MAYORS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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April 5, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae The United States Conference of Mayors ("USCM") is the official nonpartisan organization of all United States cities with populations of more than 30,000. USCM's member cities are home to hundreds of sites on the Environmental Protection Agency's ("EPA's") National Priority List ("NPL") as well as tens of thousands of brownfields—abandoned or underutilized properties whose redevelopment is complicated by either real or perceived environmental contamination.

The existence of many brownfield sites can be traced to the strict liability provisions imposed by Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9601 et seq, which also governs how these sites must be cleaned up before they can be returned to beneficial use. Congress recognized the unintended consequences that resulted from Superfund in 2003, when it passed the Small Business Liability and Brownfields Redevelopment Act, Public Law 107–118 (H.R. 2869) ("Brownfields Act"). The Brownfields Act's purpose was to assist in the cleanup of brownfield sites by granting liability protection for innocent purchasers interested in redeveloping these sites, as well as assessment and cleanup funds for other sites. At the same time, as part of the Brownfields Act, Congress enhanced the State Voluntary Cleanup Program which encourages the voluntary cleanup of environmentally contaminated sites.

Still, the current uncertainty over whether CERCLA section 107(a) allows property owners to recover for monies

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[1] This brief is filed with the written consent of all parties. Pursuant to Rule 37.6, no counsel for either party authored this brief in whole or in part, nor did any party make a monetary contribution to the preparation or submission of this brief.

spent in voluntarily cleaning up these sites means that only a small fraction of brownfields are cleaned up each year. USCM feels that it is of vital interest to the nations' cities that the legal landscape be clarified so that owners of contaminated sites that wish to voluntarily undertake cleanup are able to do so with the knowledge that they can recover other parties' proportionate share of the liability. USCM respectfully urges the affirmance of *Atlantic Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006), in which the Eighth Circuit held that CERCLA section 107(a)(4)(B) enables parties that voluntarily undertake remediation of Superfund sites to sustain pre-enforcement cost-recovery or contribution actions against other potentially responsible parties ("PRPs").

SUMMARY OF ARGUMENT

The United States Conference of Mayors supports the Eighth Circuit's interpretation of CERCLA section 107(a) as allowing a pre-enforcement contribution right. Allowing PRPs to recover remediation costs from other PRPs is critical to accomplishing Congress's central goal of encouraging voluntary cleanups of contaminated sites. Voluntary cleanups are, in turn, the only way to achieve the goal of cleaning up the thousands of contaminated sites now sitting idle and unusable in the country's cities. The task is simply too large for the federal government to initiate on its own, as Congress recognized two decades ago in passing the Superfund Amendment and Reauthorization Act of 1986 ("SARA"). This also follows from the most natural reading of the law: As a simple matter of statutory construction, section 107(a) grants an implied right of action to those PRPs that voluntarily undertake remediation of contaminated sites.

ARGUMENT

I. The Eighth Circuit's Conclusion that § 107(a) Provides for a Pre-enforcement Right of Action is in

Accordance with the Needs of United States Cities and the Purposes of Superfund

The Eighth Circuit's conclusion that section 107(a) of Superfund allows property owners to recover the costs of remediating contaminated land, even when they undertake that remediation voluntarily before a civil action or enforcement action is brought against them, furthers the goals of Superfund. Congress intended CERCLA to promote the rapid remediation of the nation's contaminated properties. If property owners forfeit their rights of cost recovery by voluntarily cleaning up such properties, it would take literally centuries to remediate the hundreds of thousands of contaminated Superfund sites in this country. Such a result would violate the principle that a statute should not be interpreted so as to lead to absurd results. *Rector, etc., of Holy Trinity Church v. United States*, 143 U.S. 457, 459-60 (1892).

A. Voluntary Cleanups are Critical to Fulfilling CERCLA's Goals

Congress enacted CERCLA in 1980 in response to the serious environmental and health risks posed by industrial pollution found at toxic waste sites across the United States. *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). *See also Exxon Corp. v. Hunt*, 475 U.S. 355, 358–359 (1986). Within five years, however, it was apparent that the federal government could not by itself accomplish the timely remediation of the hundreds of thousands of contaminated sites found in this country. At the time, the federal government estimated that there were approximately 450,000 such contaminated sites in the United States—far more than originally anticipated. U.S. General Accounting Office, *Superfund: Extent of Nation's Potential Hazardous Waste Problem Still Unknown*, GAO/RCED-88-44, Dec. 1987. When Congress considered SARA in 1985, testimony before Congress highlighted the steep costs to the federal government of trying to force PRPs to remediate

contaminated sites. *See, e.g.,* Hearing Before the Senate Committee on Environment and Public Works, H.R. Rep. No. 99-134 at 37 (1985) (statement of John C. Butler III, Director, Putnam, Hayes, and Bartlett, Inc.) (estimating that the transaction costs involved in the government's efforts to have PRPs fund and undertake site response actions at 1,800 sites on the National Priorities List ("NPL") at or above $8 billion in 1985 dollars). As this Court has explained, "Congress did not think it enough . . . to permit only the Federal Government to recoup the costs of its own cleanups of hazardous-waste sites; the Government's resources being finite, it could neither pay up front for all necessary cleanups nor undertake many different projects at the same time." *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 21 (1989), *overruled on other grounds, Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996).

For this reason, members of Congress consistently announced their intent to encourage PRPs to engage in voluntary cleanups rather than wait until EPA made its way through its national priority list ("NPL") to force them to clean up. *See, e.g.,* Report of the Senate Committee on Environment and Public Works, S. Rep. No. 99-11 at 76 (1985) (Statement of Senator Syms), *see also Pennsylvania v. Union Gas Co.,* 491 U.S. 1 at 21 ("Some help was needed, and Congress sought to encourage that help by allowing private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from the other potentially responsible parties."); *FMC Corp. v. AERO Indus.,* 998 F.2d 842, 847 (10th Cir. 1993) (recognizing that Congress sought to "encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others.").

Voluntary cleanups remain of critical importance to the Superfund scheme. The USCM can speak to the frustrating lack of progress made in its members' own back yards. The 172 cities surveyed in a 2006 USCM study on brownfields

host more than 23,810 brownfield sites, or some 130 per city. *See* The United States Conference of Mayors, *Recycling America's Land, A National Report on Brownfields Redevelopment* Volume VI at 6 (2006). The average size of these sites ranged from five to 15 acres. *Id.*.. The presence of these unremediated brownfields in United States cities shifts new economic activity to undeveloped land outside the cities, for which the legal and environmental risks are perceived to be much lower. As Professor Daniel Esty of the Yale School of Forestry explains, former industrial sites are "shunned by developers, bankers, mortgage lenders, and insurance companies due to fears of potential liability for cleanup costs. These so-called 'brownfields' have become dead zones, while new economic activity shifts to undeveloped land or 'greenfields' where toxic risks are perceived to be much lower." Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1525 (1999).

B. The Absence of Voluntary Cleanups Exacts a Huge Toll on American Cities

These vacant, unused sites exact a huge toll on United States cities. When the greenfields to which industry and developers shift their attention are on the outskirts of cities, the cities are saddled with the cost of building water, sewer, electricity, gas and roads bridging the distance—infrastructure that must be maintained on an ongoing basis. When the greenfields are outside city limits, the cities lose citizens, jobs and tax revenue to surrounding suburbs, making it harder for them to provide services within their borders—and cities still have to pay the cost of connecting the suburbs into the urban infrastructure grid. Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 150–53 (1985) (noting that because highways, transport systems, and sewers are interjurisdictional, the central city bears a portion of the cost of connecting suburbs to the city). Either way, the tendency of cities to sprawl

toward the periphery—exacerbated by the massive amount of unusable contaminated land lying vacant in city centers—imposes hefty economic and environmental costs. Robert W. Burchell, *The Costs of Sprawl—Revisited* 11 (1998) ("[F]or a fixed number of households, sprawl is the most expensive form of residential development in terms of economic costs, environmental costs, natural resource consumption, and many types of personal costs.").

At present, United States cities struggle to remediate brownfield sites and return them to beneficial use. The 172 cities that responded to the USCM survey have managed to remediate 1409 contaminated sites total, and are currently working on 1,189 more. *Recycling America's Land* at 6. This is a mere drop in the ocean compared to the 23,000 sites in those cities, and the hundreds of thousands of sites that USCM extrapolates are in its 30,000 member cities. The primary reason that progress has been so slow is the lack of cleanup funds, *Recycling America's Land* at 6 (noting that 86% of respondents to the survey cited lack of cleanup funds as an impediment to remediation), as well as the hefty price of cleanups, which run into the millions of dollars for most sites. *See, e.g., Cooper Industries, Inc. v. Aviall Services Inc.*, 543 U.S. 157 (2004) (involving a $5 million remediation); *United States v. DiBiase*, 45 F.3d 541, 542 n.1 (1st Cir. 1995) (cost of cleaning up five-acre wetland disposal area more than $2.25 million); *In re Hemingway Transp. Inc.*, 174 B.R. 148, 161–164 (Bankr. D. Mass. 1994) (land purchased for $1.6 million costs more than $6 million to clean up); *United States v. Md. Bank & Trust Co.*, 632 F. Supp. 573, 575 (D. Md. 1986) (land bought for $381,500 cost more than $5.5 million to clean up); *FDIC, Resolution Trust Corp. Seek Protection in Senate Bill Limiting Exposure Under CERCLA*, 21 Env't Rep. (BNA) 533, 533 (July 27, 1990) (RTC estimate that its 270 contaminated sites would cost $3.7 million each to clean up, in 1990 dollars). This high cost prevents most owners of brownfields sites (as well

as prospective purchasers) from undertaking the remediation of brownfields on their own.

The USCM believes firmly that owners of brownfield sites in their cities will not remediate these sites voluntarily, as Congress wished in enacting SARA, unless they are able to shift the portion of the costs for which other PRPs are responsible onto those PRPs before they are brought into court by the federal government. *Accord* U.S. General Accounting Office, *Environmental Cleanup: Transfer of Contaminated Federal Property and Recovery of Cleanup Costs*, GAO-05-1011R, Oct. 17, 2005 (absence of a clear statement that pre-enforcement contribution actions are allowed "may complicate efforts to clean up contaminated properties by providing a disincentive for parties to voluntarily carry out such cleanups."); *Consolidated Edison Co. of New York v. UGI Utilities, Inc.*, 423 F.3d 90, 100 (2d Cir. 2005) ("Were this economic disincentive in place, such parties would likely wait until they are sued to commence cleaning up any site for which they are not exclusively responsible because of their inability to be reimbursed for cleanup expenditures in the absence of a suit."); *Syms v. Olin Corp.*, 408 F.3d 95, 106 n.8 (2d Cir. 2005) (observing that "the combination of *Cooper Industries* and *Bedford Affiliates [v. Sills*, 156 F.3d 416 (2d Cir. 1998)]. . . would create a perverse incentive for PRPs to wait until they are sued before incurring response costs").[2]

Preliminary research by the Northeast Midwest Institute ("NEMWI") confirms that the holding in *Cooper v. Aviall* that pre-enforcement contribution rights are not available under CERCLA section 113(f) "appears to have negatively impacted the cleanup and redevelopment of larger, more

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[2] Even if landowners do sue, should they be denied a cause of action for cost recovery simply because they undertook remediation voluntarily, many PRPs responsible for the contamination would escape liability, a result directly contrary to CERCLA's "polluters pay" structure.

complicated brownfields sites, . . . generally slowing cleanup progress, while increasing transaction costs." Northeast Midwest Institute, *Preliminary Research: Impacts of the* Aviall *Supreme Court Decision on Brownfields Cleanups* at 1 (April 5, 2007 Draft). According to NEMWI, the costs are going up and cleanup slowing down at certain sites as owners exit State voluntary cleanup programs and seek to have enforcement actions brought against them so that they can later recover from other PRPs.[3] *Id.* At other sites, where the owners had been pursuing contribution actions before *Cooper v. Aviall*, cleanup has stopped out of fear that the owners cannot recover from other PRPs. *Id.* Cleanups are being taken off the table altogether at sites where "cleanup costs represent a high proportion of total development costs" because of the "greater risk that unanticipated cleanup costs will make the project infeasible[.]" *Id.*

Without a clear statement from the federal courts that they will be able to recover cleanup costs from other PRPs before an enforcement action is brought against them, owners must at present wait for the EPA or a state to bring an enforcement action against them before undertaking these cleanups. Should this status quo continue, the nation's cities will be saddled with the burden of supporting the infrastructure required to reach sprawling development, and suffer the loss of jobs, citizens and their tax base to outlying suburbs. Hundreds of thousands of contaminated sites will remain unremediated, decades after Superfund was enacted. This is clearly not what Congress envisioned.

II. The Text of CERCLA § 107(a) Provides for a Pre-enforcement Right of Action

As the numerous government, environmental and industry groups that have filed amicus briefs in this case on

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[3] Representatives of state voluntary cleanup programs have confirmed to NEMWI that land owners are exiting voluntary cleanup programs and seeking listing on the NPL. *Id.*

the side of Atlantic Research urge, interpreting CERCLA § 107(a) to allow for a contribution right for voluntary cleanups undertaken prior to EPA action against PRPs is not only the correct result from a policy standpoint, but is also provided for in the text of the statute itself. Section 107(a) provides for an implied right of contribution stemming from the joint and several liability it imposes on PRPs. The inclusion of a savings clause in section 113(f) of CERCLA implies that a section 107(a) action remains available for those to whom the specific section 113(f)(1) contribution provision is not available. Further, the implied contribution right in section 107(a) is not limited to parties against whom an enforcement action has been brought. Thus, as a simple matter of statutory construction, section 107(a) grants an implied contribution right to those PRPs that voluntarily undertake remediation of contaminated sites. This interpretation is supported by SARA's legislative history.

A. Section 107(a) expressly provides a right of action between PRPs.

An implied right of contribution is found in CERCLA section 107(a), stemming from the joint and several liability it imposes on four categories of PRPs.[4] *Key Tronic v. United States*, 511 U.S. 809, 816 (1994) ("[CERCLA] expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107."). The way in which it does so makes it clear that these PRPs are joint and severally liable not just for costs incurred by government entities, but also for costs incurred by other PRPs.

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[4] These include present and past owners of contaminated facilities; operators of contaminated facilities; persons who arranged for disposal of hazardous substances at the facilities; and transporters of the hazardous substance to the facilities. 42 U.S.C. § 9607(a)(4)(B).

CERCLA section 107(a)(4)(A) imposes liability on PRPs for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe[.]" 42 U.S.C. § 9607(a)(4)(A). The next section, CERCLA section 107(a)(4)(B), goes on to impose liability on PRPs for "any other necessary costs of response incurred by *any other person*[5] consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B) (emphasis added). It logically follows that "any other person" must refer to private parties and local parties—that is, "persons" who are not the United States Government, a State, or an Indian tribe. By implication, this section contemplates that private parties and local governments will *incur* costs to remediate Superfund sites. This is the most natural reading of this section of the statute.

This Court has said as much. In *Key Tronic v. United States*, 511 U.S. 809, 818 n.11 (1994) the Court stated that by imposing liability on PRPs for costs "incurred by any other person," section 107(a) "implies . . . that [PRPs] may have a claim for contribution against those treated as joint tortfeasors." Despite these statements of the Court, the United States argues that section 107(a)(4)(B) supplies a cause of action only for "innocent" private parties, which it defines to include owners of adjacent properties (to whose land contamination has spread) or *bona fide* purchasers. Pet. Br. at 15–16. This is a tortured reading at best.

What the United States is arguing is that, because the *subject* of the statutory phrase is PRPs, "any other person" must refer to non-PRPs, i.e., innocent private parties. *Id.* But this is unsound as a matter of both logic and grammar.

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[5] CERCLA defines person to include "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21).

What the Government argues is akin to saying, for instance, that if an exam administrator tells students that they may speak to teachers or proctors in the room, but may not speak to "any other person" during the exam, the students may still speak to other students because they, as the subject of that sentence, must be logically be excluded from the group "any other person."

Further, by accepting that "any other person" includes owners of adjacent properties or *bona fide* purchasers, the Government agrees that "any other person" must refer to a class of parties beyond the federal government, states or Indian tribes. Having in effect conceded this, it then relies on the feeblest of logic to imply that that phrase excludes fellow PRPs. If it accepts the former, it must accept that section 107(a)(4)(B) provides a right of action to recover from *all* other persons that may incur cleanup costs, including fellow PRPs.[6] *Accord Metropolitan Water Reclamation District of Greater Chicago v. North American Galvanizing & Coatings, Inc.*, 473 F.3d 824, 835 (7th Cir. 2007) (rejecting United States argument that "any other person" refers only to innocent parties, on grounds that "other" as used in section 107(a)(4)(B) was simply meant to distinguish "any other person" from "the United States, a State or an Indian tribe" as used in the prior paragraph.)

The Government's construction is problematic on other levels, raised by the other amici in this case. First, it would have been of doubtful utility for Congress to impose liability on PRPs for *all* government response costs, but impose

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[6] In fact, the Government has accepted this latter principle in the past. *See* Brief of the United States as *Amicus Curiae*, 5, 20–21 *Cooper v. Aviall*, 543 U.S. 157 (2004) (No. 02-1192) (explaining that "any other person" refers to section 107(a)(4)(B) plaintiffs); Brief of the United States 12, *Key Tronic v. United States*, 511 U.S. 809 (1994) (No. 93-376) (recognizing that petitioner, a private PRP, was authorized by section 107(a)(4)(B) to recover necessary response costs).

liability on them for only that tiny slice of *private-party* response costs incurred by so-called innocent PRPs. Why, in essence, allow for the government and so-called "innocent parties" to obtain money to clean up, but not those PRPs who own or operate the lion's share of Superfund sites? Second, this begs the point, made by the States in their amicus brief, that, when Congress drafted the language in section 107 in 1980, it made no distinction between "innocent" and non-innocent PRPs.

B. Section 107(a) was not vitiated by the 1986 Superfund Amendments.

As this Court stated in *Key Tronic*, 511 U.S. at 818 n.11, by imposing liability on PRPs for costs "incurred by any other person," section 107(a) "implies . . . that [PRPs] may have a claim for contribution against those treated as joint tortfeasors." This provision remains in effect, despite the addition of section 113(f) to Superfund in SARA. *See Key Tronic*, 511 U.S. at 816 (noting that section 113(f) provides a "similar and somewhat overlapping remedy" to that provided in section 107(a)). *Accord Cooper v. Aviall*, 543 U.S. 157, 163 n.3 (2004) (reaffirming *Key Tronic's* recognition of a 'cost recovery remedy of § 107(a)(4)(B)" that is "clearly distinct" from that of section 113(f)(1)).

Section 113(f) provides that: "Any person may seek contribution from any other person who is liable or potentially liable under section 9607 (a) of this title, during or following any civil action under section 9606 of this title or under section 9607 (a) of this title." 42 U.S.C. § 9613(f). The legislative history and text of this provision shows that Congress intended the provision to add to, and not eviscerate, the right of cost recovery in section 107(a).

During the first years that Superfund was in effect, the lower courts disagreed on whether section 107(a) provided an implied right of action between PRPs. *See Cooper v. Aviall*, 543 U.S. 162–63 (describing disagreement). Most, however,

agreed that section 107 did afford PRPs an implied right of action. *Compare Walls v. Waste Res. Corp.*, 761 F.2d 311, 318 (6th Cir. 1985) (allowing cost recovery under section 107(a) as consistent with the language of the section and Congress' purpose in enacting CERCLA); *Wickland Oil Terminals v. Asarco*, Inc., 792 F.2d 887, 889–90 (9th Cir. 1986) (same); *United States v. Ward*, 1984 WL 15710, at *1–2 (E.D.N.C. May 14, 1984) (same); *Bulk Distribution Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1443 (S.D. Fla. 1984) (same); *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1428–29 (S.D. Ohio 1984); *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135, 1140–1143 (E.D. Pa. 1982) (same); and *United States v. New Castle County*, 642 F. Supp. 1258, 1261–1269 (D. Del. 1986) (same); with *United States v. Westinghouse Electric Corp.*, 1983 WL 160587 (S.D. Ind. 1983) (disallowing cost recovery under section 107(a)). In light of this uncertainty, Congress included section 113(f) in SARA to clarify and confirm the right of contribution that courts had been implying under section 107(a). *See, e.g.*, Report of the Senate Environment and Public Works Committee, S. Rep. 99-11 at 43 (1985) (language meant to "clarify[y] and confirm[] existing law to provide right of contribution).

But Congress did not *supersede* section 107(a) with the addition of section 113(f). The drafts of SARA being circulated in the Senate amended section 107 (to clarify and confirm the contribution right) but did not add a separate section. *See, e.g.*, Report of Senate Committee on Environment and Public Works at 43 (proposing an amendment that "clarifies and confirms existing law governing liability of potentially responsible parties by adding a new subsection 107(e)"). This course was later abandoned, in favor of adding an additional clause in the form of section 113(f), as proposed in the original House drafts. *See, e.g.*, Report of the Committee on Energy and Commerce, H. R. Rep. No. 99–253 at 79 (1985) (explaining

that a proposed section 113(f) "confirms a Federal right of contribution or indemnification for persons alleged or held to be liable under section 106 or 107 of CERCLA"). The fact that section 107(a) survives shows that section 113(f) was meant to supplement, rather than supersede section 107(a).

C. Section 107(a)'s right of action is not time-limited.

If section 107(a)(4)(B) provides a right of action between fellow PRPs, that right of action is not time-limited. In other words, section 107(a)(4)(B) liability attaches whether or not an enforcement action has been brought against the PRPs that undertake a cleanup. This is implied by the fact that section 113(f), which operates independently from but simultaneously with section 107(a), is specifically limited to persons against whom enforcement actions have been brought, but section 107(a) does not.

Section 113(f) limits the timing of the contribution action that may be brought thereunder to "during or following any civil action . . . ." 42 U.S.C. § 9613(f)(1). This was the express holding of this Court in *Cooper v. Aviall Industries,* 543 U.S. 157 (2004). By contrast, section 107(a) contains no such language. It merely imposes liability for cleanup costs incurred by "any other person," without delimiting it to any specific time period or conditioning it upon a further trigger event. 42 U.S.C. § 9607(a)(4)(B).

In fact, Congress considered and rejected a version of SARA that would have imposed the same delimiting rules on section 107(a) that governed section 113(f). The Reagan Administration submitted a proposal that section 107 be amended to include the specification that "[a]ny contribution action brought under this paragraph shall be brought in accordance with section 113." *See* Communication from the President of the United States Transmitting a Draft of Proposed Legislation to Amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 at 24 (Feb. 26, 1985). The enacted version of section

107 does not contain this language. It follows that the right of contribution under section 107 is not limited to the parties against whom a civil action had been brought.

The United States asks that this Court do, in effect, what the Reagan Administration failed to get Congress to do twenty years ago, and limit the right of contribution under both section 113(f) and section 107(a) to all but those against whom a formal civil enforcement action has been brought. We urge this Court to reject that reading.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the brief of respondent, the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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April 5, 2007

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39/98

No. 06-562

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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RULE 29.6 STATEMENT

Amicus Curiae Consolidated Edison of New York, Inc. is a wholly owned subsidiary of Consolidated Edison, Inc. No other publicly held corporation owns 10% or more of the stock of Consolidated Edison, Inc.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Consolidated Edison Company of New York, Inc. ("Con Edison") is the respondent in a petition that is being held pending disposition of this case. See *UGI Utils., Inc.* v. *Consolidated Edison Co. of N.Y., Inc.*, No. 05-1323 (U.S. filed Apr. 14, 2006). Con Edison is thus directly interested in the Court's resolution of the question presented regarding the availability to potentially responsible parties (PRPs) of a private right of action under section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").

Con Edison and its predecessors formerly owned or operated in New York a number of manufactured gas plants (which produce gas from coal, oil, and other sources). *Consolidated Edison Co. of N.Y., Inc.* v. *UGI Utils., Inc.*, 423 F.3d 90, 92-93 (2d Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3600 (U.S. Apr. 14, 2006) (No. 05-1323). In October, 1999, the New York State Department of Environmental Conservation ("NYSDEC") contacted Con Edison regarding the investigation and clean-up of hazardous substances at former manufactured gas plant sites. *Id.* at 93. On September 20, 2001, Con Edison filed a complaint against UGI Utilities, Inc. seeking to recover under CERCLA its response costs at certain of the sites, on the grounds that UGI was liable as the successor to "person[s] who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). On August 15, 2002, Con Edison entered into a Voluntary Cleanup Agreement ("VCA") with NYSDEC to

---

[1] No person or entity other than Consolidated Edison Company of New York Inc. or its counsel made a monetary contribution to the preparation or submission of this brief, and no counsel for a party authored this brief in whole or in part. Both petitioner and respondent have consented to the filing of this brief, and the letters of consent have been filed with the Clerk.

investigate and clean up, with NYSDEC oversight, more than 100 properties comprising the former grounds of manufactured gas plants that Con Edison or its predecessors once owned or operated. *Consolidated Edison*, 423 F.3d at 93. Once Con Edison completes its obligations under the VCA, it will receive releases and covenants-not-to-sue from NYSDEC.

The district court granted summary judgment to UGI, but the Second Circuit reversed. It held that Con Edison was not entitled to a contribution remedy under section 113(f)(3) of CERCLA as "[a] person who has resolved its liability to the United States or a State for some or all of a response action." 42 U.S.C. § 9613(f)(3)(B). The Second Circuit construed the release and covenant-not-to-sue that Con Edison was to receive from the NYSDEC under the VCA to encompass only state law claims, and not to resolve fully and finally Con Edison's federal liability to the State of New York under CERCLA. *Consolidated Edison*, 423 F.3d at 95-97. However, the court of appeals held that section 107(a) does grant PRPs like Con Edison a private right of action against other PRPs to recover response costs. *Id.* at 97-103. The Eighth Circuit adopted the same rule below, which the Government has challenged.

Con Edison believes that this brief will be useful to the Court because it presents the perspective of the many PRPs who conduct hazardous waste clean-ups in cooperation with state authorities and who would improperly be denied recovery under the Government's interpretation of section 107(a).

BRIEF OF *AMICUS CURIAE*

The Government's proposed statutory interpretation – that section 107(a) of CERCLA affords a private right of action for cost recovery only to "innocent" parties, Petr. Br. 11 – offends both the plain language and policies of CERCLA. Ironically, the Government principally defends its position as

necessary to encourage PRPs to enter into settlements with federal and state authorities, *id.* at 40, but adoption of the Government's position would likely have precisely the opposite effect. As the Government concedes, "[a]t a substantial number of contaminated sites, States have primary responsibility for cleanup or monitoring." *Id.* at 4 n.3. Given the narrow judicial construction of the contribution remedy provided in section 113(f)(3)(B), countless parties like Con Edison that clean up hazardous substances at sites in good faith under voluntary agreements with state authorities would have no recourse to recover costs from the actual polluters if section 107(a) is narrowed in the manner the Government suggests. Accordingly, if the Court were to accept the Government's construction, PRPs may be inclined to force the State to litigate site clean-up – rather than cooperate with the State – to preserve their rights to recover response costs. The Government's position is bereft of any basis in text or policy.

To avoid duplication of respondent's brief, Con Edison will not engage in a point-by-point rebuttal of the Government's arguments, but will focus on two issues that most directly implicate Con Edison's interests: (1) the irreconcilability of the Government's construction of section 107(a) with the plain language of the statute, and (2) the relationship of sections 107(a) and 113, and the critical need for this Court to interpret section 107(a) in light of the dominant presence of state abatement and oversight activities in this field.

SUMMARY OF ARGUMENT

The Government's proposed construction of section 107(a) has no force. The statute provides that PRPs are liable for "all costs of removal or remedial action *incurred by the United States Government or a State or an Indian tribe* not inconsistent with the national contingency plan," and for "other necessary costs of response *incurred by any other person* consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A) & (B) (emphases added). The phrase "any

other person" is meant to distinguish between the two categories of expressly identified persons incurring such costs, and thus plainly refers to any person other than "the United States Government or a State or an Indian tribe." Pet. App. 30a. The Government's claim that "any other person" refers instead to a person who is not a PRP is an unnatural reading of the text, and indeed it is contrary to the interpretation of this provision in EPA regulations.

Equally fundamentally, the Government's construction cannot be adopted because it eviscerates the contribution remedy of section 113(f)(1). The Government fails to heed the central teaching of this Court in *Key Tronic Corp.* v. *United States*, 511 U.S. 809 (1994), that the text of section 107(a) defines the persons *liable*, not the plaintiffs entitled to enforce that liability. *Id.* at 818 & n.11. Under the Government's reading of the phrase "any other person" in section 107(a)(4)(B), a PRP "shall be *liable*" for the "necessary response costs incurred by" innocent parties (but not by other PRPs). If that were correct, a PRP also could not seek contribution from another PRP under section 113(f). Section 113(f)(1) only authorizes a person to "seek contribution from any other person *who is liable or potentially liable* under section 9607(a) of this title." 42 U.S.C. § 9613(f)(1) (emphasis added). However, if no PRP is "liable" under section 107(a) for response costs incurred by another PRP (as the Government insists), no PRP could ever have a contribution remedy under section 113(f)(1) to recover those costs against a PRP (since contribution may be sought under that provision only against parties with liability for those costs under section 107(a)). That is plainly untenable, and the Government's strained construction of the statute should be rejected.

The Government's arguments are unfounded not only in the text but also in the policy of CERCLA. The Government paints a simple picture for the Court where any PRP need only settle with federal or state authorities and thereby gain a contribution remedy under section 113(f)(1) or (f)(3)(B). The

Government neglects the prevailing judicial construction of section 113(f)(3)(B). That statute makes a contribution remedy available to a person "who has *resolved its liability* to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement." *Id.* § 9613(f)(3)(B) (emphasis added). Courts have interpreted that phrase to require resolution of *federal* liability to a State under CERCLA. However, CERCLA creates federal liability of PRPs to States only for the response costs that a State incurs itself. States have no federal power to order abatement or other response actions under CERCLA, and *state law* governs the liability of a PRP to a State to perform clean-up of hazardous wastes. Courts have denied section 113(f)(3)(B) remedies to PRPs who clean up sites in cooperation with state authorities under state law, ruling instead that the proper remedy is a cost-recovery action under section 107(a). The Government's crabbed construction of section 107(a) would deprive PRPs who cooperate with state authorities of any ability to recover costs from other PRPs (including more culpable parties directly responsible for the hazardous wastes), even though the vast majority of clean-ups occur under state supervision. The Government's position does not reward parties who settle with federal and state authorities, as it claims; at least as to the many PRPs incurring response costs in cooperation with (and under the supervision of) state authorities, it leaves them without any remedy at all.

Congress enacted the express contribution remedies of section 113(f) as a complement to the implied cost-recovery actions of section 107(a), which are available whenever no express remedy is granted to promote the expeditious clean-up of hazardous wastes in this country. This Court should affirm the decision below.

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 107(a) OF CERCLA GRANTS POTENTIALLY RESPONSIBLE PARTIES A RIGHT TO SEEK RECOVERY OF THEIR COSTS.

"In 1980, CERCLA was enacted in response to the serious environmental and health risks posed by industrial pollution." *United States* v. *Bestfoods Corp.*, 524 U.S. 51, 55 (1998). "Two of its primary goals include encouraging the timely cleanup of hazardous waste sites, and placing the cost of that cleanup on those responsible for creating or maintaining the hazardous condition." *Consolidated Edison*, 423 F.3d at 94 (internal quotation marks and brackets omitted).

In CERCLA, Congress attacked the problem of hazardous wastes by granting federal abatement powers to the President and creating a scheme of private and public liability for response costs. "Sections 104 and 106 provide the framework for federal abatement and enforcement actions that the President, the EPA as his delegated agent, or the Attorney General initiates." *Key Tronic Corp.*, 511 U.S. at 814. Section 105 directs the President to formulate a national contingency plan ("NCP") that would include "procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants," and would prioritize sites for remedial or response actions. 42 U.S.C. § 9605(a).

Given the extraordinary expense of cleaning up the many thousands of the nation's hazardous-waste sites, Congress created strict liability (subject to specific statutory defenses) for four kinds of PRPs: (1) the current owner and operator of a vessel or a facility; (2) the owner or operator of a vessel or a facility at the time of disposal of the hazardous substance; (3) any person who arranged for disposal or treatment of hazardous substances he owned or possessed at another's vessel or facility; and (4) a transporter who selected a vessel or facility

from which hazardous substances were released. *Id.* § 9607(a). Those PRPs

> shall be liable for –
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Id.

In *Key Tronic*, this Court recognized that "§ 107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs." *Key Tronic*, 511 U.S. at 818. Indeed, all nine Justices agreed on that point. But whereas the dissent construed the foregoing language as "the *express* creation of a right of action," *id.* at 822 (Scalia, J., dissenting), the majority construed section 107(a) as "only impliedly authoriz[ing] suit," *id.* at 818. The majority reasoned that "Section 107 ... merely says that 'A shall be liable' without revealing to whom A is liable." *Id.* at 818 n.11 (emphasis omitted).

This Court addressed the relationship of sections 107(a) and 113 in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004). Under CERCLA, as originally enacted, courts had long held that "a private party that had incurred response costs, but that had done so voluntarily and was not itself subject to suit, had a cause of action for cost recovery

against other PRPs," but there was uncertainty as to whether "a private entity that had been sued in a cost recovery action (by the Government or by another PRP) could obtain contribution from other PRPs." *Id.* at 161-62. Congress amended CERCLA in the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, to provide express rights of action for contribution. Section 113(f)(1) authorized "[a]ny person [to] seek contribution from any other person who is liable or potentially liable under section [107(a)] of this title, during or following any civil action under section [106] of this title or under section [107(a)] of this title." 42 U.S.C. § 9613(f)(1). Section 113(f)(3)(B) further authorized a contribution remedy for "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement." *Id.* § 9613(f)(3)(B).

In *Cooper*, this Court held that, under the plain terms of the statute, the express section 113(f)(1) contribution remedy could only be pursued "during or following" a section 106 abatement action or a section 107(a) cost-recovery action. 543 U.S. at 168. This Court declined to resolve the relationship of sections 107(a) and 113, *id.* at 168-71, other than to recognize that the remedies created by those sections, while "clearly distinct," "both allow private parties to recoup costs from other private parties," *id.* at 163 n.3.

A. Section 107(a) Specifically Authorizes "Any" Private Person To Recover "Necessary Costs Of Response" From PRPs.

The meaning of section 107(a) is clear. It provides that PRPs are liable for "*all* costs of removal or remedial action *incurred by the United States Government or a State or an Indian tribe* not inconsistent with the national contingency plan," and for "other *necessary* costs of response *incurred by any other person* consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A) & (B) (emphases added).

The purpose of these two subsections is to assign different liability to PRPs for response costs incurred by governmental entities as opposed to response costs incurred by private persons.[2] Under subsection 107(a)(4)(A), "the defendant has the burden of proving that the government's costs are inconsistent with the NCP," whereas "under § 107(a)(4)(B), nongovernmental entities are required to prove that their response costs are necessary and consistent with the NCP." *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 906 n.23 (5th Cir. 1993).

Accordingly, the plain meaning of the phrase "any other person" in context is to distinguish between the two cost-incurring groups to whom different liability is owed: the higher liability standard applies to costs incurred by any person "other" than "the United States Government or a State or an Indian tribe." Pet. App. 30a; *Metropolitan Water Reclamation Dist.* v. *North Am. Galvanizing & Castings, Inc.*, 473 F.3d 824, 835 (7th Cir. 2007) ("we read the two subsections, and the reference to 'any other person,' simply as the statute's way of relaxing the burden of proof for governmental entities as opposed to private parties"). "Person" is a defined term under CERCLA that encompasses the United States Government, States, and Indian tribes, 42 U.S.C. § 9601(21), and so the term "any other person" necessarily refers to *any* person within the definition "other" than the three governmental entities: *i.e.*, any "individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, ... municipality, commission, political subdivision of a State, or any

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[2] The costs of removal and remedial actions referenced in subsection 107(a)(4)(A) are the same as the "costs of response" referenced in section 107(a)(4)(B). *See* 42 U.S.C. § 9607(a)(4)(A) & (B); *id.* § 9601(25) (The terms 'respond' or 'response' means remove, removal, remedy, and remedial action; all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto."); *see also id.* § 9601(23) & (24) (defining "remedy" and "remedial action" and "remove" and "removal").

interstate body." *Id.*[3] Section 107(a)(4)(B) thus provides that a PRP "shall be liable" to *any* person other than the specified governmental persons (including, without limitation, other PRPs) for "necessary costs of response ... consistent with the national contingency plan." *Id.* § 9607(a)(4)(B); *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting *Webster's Third New International Dictionary* 97 (1976)).

Because PRPs have liability for necessary response costs incurred by private PRPs, it takes the smallest leap of implication for this Court to determine who may bring a judicial action to enforce that liability. The Act's creation of liability necessarily implies that there must be some means for parties incurring the costs to enforce the liability of PRPs, or else section 107(a) would be ineffectual; indeed, this is why the three dissenting justices in *Key Tronic* deemed the language "shall be liable" in section 107(a) "the *express* creation of a right of action" in favor of those incurring the costs. 511 U.S. at 822 (Scalia J., dissenting). But, even under the rule of the *Key Tronic* majority (where rights of action must be implied), it follows that every person who has incurred necessary response costs for which a PRP is liable must have a right of action to enforce that liability, and such a right of action must be implied where the Act does not provide an express remedy (such as a contribution remedy under section 113(f)). The Second, Seventh, and Eighth Circuits have properly so concluded. *Consolidated Edison*, 423 F.3d at 100 ("Section 107(a) makes its cost recovery remedy available, in quite simple language, to any person that has incurred necessary costs of response ...."); *Metropolitan Water Reclamation Dist.*, 473 F.3d at 834; Pet. App. 14a (an action under section 107(a) is available to "parties who have incurred necessary

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[3] The definition of "person" explicitly includes the United States Government and a State, and an Indian tribe is an association. 42 U.S.C. § 9601(21).

costs of response, but have neither been sued nor settled their liability under §§ 106 or 107").

B. The Government's Contrary Reading Of Section 107(a) Is Irreconcilable With The Plain Language, Eviscerates The Section 113 Remedy, And Departs From The EPA's Interpretation.

Anxious to avoid response cost actions against it when it is a PRP, the Government advances a narrow construction of section 107(a). It contends that the phrase "any other person" in section 107(a) excludes all PRPs previously enumerated in that section. Petr. Br. 15. That is not the natural reading of the statutory text. As noted above, the designation of "any other person" incurring response costs is meant to exclude the governmental entities – United States, States, and Indian tribes – who also incur response costs, but whose costs are subject to different treatment in subsection 107(a)(4)(B). In any event, even if *arguendo* the phrase "any other person" serves to distinguish the person who has the liability for response costs from the person who incurred them, that would not avail the Government. Section 107(a) provides that certain individual PRPs "shall be liable" for response costs: namely, "the owner and operator of a vessel or a facility" or "any person" who meets the other enumerated stautory criteria. 42 U.S.C. § 9607(a)(1)-(4). The phrase "any other person" to whom that individual PRP is liable would include *other* PRPs, since, as the Government concedes, PRPs are "persons" as defined in CERCLA. *Id.* Moreover, "any other person" means just that; it does not mean "any other person not in the same category" as the liable party. Clearly, for example, a PRP who is the current owner and operator of a facility would not be the same person as a former owner and operator of the facility. The Government's self-serving interpretation cannot be squared with the language of section 107, even when that section is read in isolation.

But statutes are read not in isolation but rather as a whole. *United States* v. *Morton*, 467 U.S. 822, 828 (1984). Therein

lies a central flaw in the Government's argument: its reading of section 107(a) would eviscerate the section 113 contribution remedy that the Government claims is always available to private PRPs after they have been sued or entered into a settlement with federal or state authorities (Petr. Br. 26-31). In its haste to narrow the class of potential PRP plaintiffs, the Government fails to heed the central teaching of *Key Tronic*: namely, that the text of section 107(a) defines the persons *liable*, not the plaintiffs entitled to enforce that liability. 511 U.S. at 818 & n.3. Under the Government's reading of the phrase "any other person" in section 107(a)(4)(B), a PRP "shall be *liable*" for the "necessary response costs incurred by" innocent parties (but not by other PRPs). But, if that were correct, a PRP also could not seek contribution from another PRP under section 113(f). That is because section 113(f)(1) only authorizes a person to "seek contribution from any other person *who is liable or potentially liable* under section 9607(a) of this title." 42 U.S.C. § 9613(f)(1) (emphasis added). According to the Government, a PRP is never liable under section 107(a) for the response costs incurred by another PRP (but only for those incurred by innocent parties). If so, no PRP could seek to recover its response costs in contribution from another PRP under section 113(f)(1), since the latter would have no liability (or potential liability) for those costs under section 107(a).

The Government's house of cards falls down. It cannot insist that PRP "A" has no liability for the costs incurred by PRP "B" under section 107(a), and at the same time insist that after judgment or settlement PRP "B" can seek to recover its costs from PRP "A" in contribution under section 113(f)(1).

Other flaws plague the Government's construction. The Government claims that the phrase "any other person" refers to "innocent parties" like "'a landowner forced to clean up hazardous materials that a third party spilled onto its property or that migrated there from adjacent lands,'" Pet. Br. 16 (quoting dicta from *Akzo Coatings, Inc.* v. *Aigner Corp.*, 30

F.3d 761, 764 (7th Cir. 1994)), or a person who qualifies as a "bona fide prospective purchaser" ("BFPP") under 42 U.S.C. §§ 9601(40) and 9607(r)(1) and is not a PRP by operation of law. Petr. Br. 16. But a landowner whose property is contaminated by releases from neighboring lands is a PRP except in the narrow circumstance where a statutory defense applies; the contaminated property would be a "facility" under CERCLA, a term which is defined to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9)(B). The owner of contaminated property in the Government's example is the "owner and operator of ... a facility," *id.* § 9607(a)(1), and thus a PRP.

While the Government is correct that a BFPP is not a PRP if he does not impede response actions, *id.* § 9607(r)(1), the BFPP exception was not enacted until 2002. Pub. L. No. 107-118, § 222(b), 115 Stat. 2356, 2368, 2371 (2002). So under the Government's reading, from the passage of CERCLA in 1980 until 2002, the private parties entitled to institute a cost-recovery action under section 107(a) formed almost a null set. The Government has not cited a single case of an "innocent" private party who has brought suit under section 107(a), but, if there are any, it is inarguably a minuscule number. It is implausible to surmise that Congress created this central feature of CERCLA to provide only these rare parties with a remedy.

Indeed, the label "innocent" party is itself a misnomer. Because CERCLA creates strict liability and does not require wrongdoing, Pet. App. 4a, a PRP is often innocent in any ordinary sense of the word. PRPs include current site owners who did not release hazardous substances and may not even have known of their existence. But the Government's position would mean that the current owner – who is often the party who voluntarily cleans up hazardous substances on his or her property (rather than wait to be sued or approached for settlement by federal or state authorities) – has no recourse to

recover costs against persons whose culpability for the hazardous waste release is far greater. That could not have been Congress's intent.

Furthermore, the Government's current litigating position – that only so-called innocent parties may bring a section 107(a) action for cost recovery – is directly contrary to EPA's construction in its regulations. The applicable regulation (promulgated after SARA, see 59 Fed. Reg. 47384, 47452 (Sept. 15, 1994)) provides that, absent a statutory prohibition, "any person may undertake a response action to reduce or eliminate a release of a hazardous substance, pollutant, or contaminant," 40 C.F.R. § 300.700(a), and under section 107(a) "any person may receive a court award of his or her response costs, plus interest, from the party or parties found to be liable," *id.* § 300.700(b)(1).[4] Discussion of that regulation – which follows the natural interpretation of section 107(a) – is conspicuously absent from the Government's brief. The Government's construction of section 107(a) is unsound.[5]

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[4] The Government's construction of section 107 would also bar PRPs working under an EPA-issued Unilateral Administrative Order ("UAO") from recovering clean-up costs from other responsible parties. Lower courts have held that UAOs are not civil actions for purposes of contribution claims under section 113(f)(1), thereby barring an action under that section. *Raytheon Aircraft Co.* v. *United States*, 435 F. Supp. 2d 1136 (D. Kan. 2006). However, recognizing the inequity in such a holding, that court allowed the PRP to pursue an action to recover its costs under section 107, exactly the type of action the Government's position here would foreclose.

[5] The Government has successfully taken the manifestly unfair position that it has a section 107(a) remedy to recover costs it incurs not in its governmental capacity but as a PRP, *United States* v. *Simon Wrecking, Inc.*, No. 06-928, 2007 WL 789189, at *4 (E.D. Pa. Mar. 14, 2007), even though the statute requires that its provisions apply "both procedurally and substantively" in the same manner to the federal government and private parties, 42 U.S.C. § 9620(a)(1).

II. THE CREATION OF EXPRESS REMEDIES IN SECTION 113 DID NOT WHOLLY ELIMINATE SECTION 107(a) RIGHTS OF ACTION FOR PRPs.

As the foregoing demonstrates, section 107(a) implies a private right of action in favor of PRPs to recover response costs from other PRPs. A subsequent amendment to a statute, however, may alter the implications to be drawn from an existing statute. Petr. Br. 26; *United States* v. *Fausto*, 484 U.S. 439, 453 (1988). SARA created express contribution remedies for private parties in 1986, and there is no longer a need to imply a remedy under section 107(a) in circumstances where PRPs have an express remedy under section 113. Pet. App. 17a ("liable parties which have been subject to §§ 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continued vitality"); see *Alexander* v. *Sandoval*, 532 U.S. 275, 290-91 (2001); *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973) (express remedies exclusive where they "clearly appl[y]").[6]

But that does not mean, as the Government suggests, that the enactment of section 113 eliminated *all* preexisting section 107(a) remedies for PRPs. Section 113(f) was enacted only to eliminate doubt as to whether section 107(a) implied a right to seek *contribution* once federal CERCLA liability is established. Either section 113 created a wholly new and complementary remedy (if the implied action under section 107(a) never extended to contribution remedies), or alternatively section 113 displaced the implied section 107(a) remedies *pro tanto*. H.R. Rep. No. 99-253, pt. 1, at 79 (1985) ("[Section 113(f)] clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially responsible parties."); *see also Key Tronic Corp.*, 511 U.S. at 816 (noting that after SARA,

[6] The language of section 113 indicates that it is the exclusive remedy for contribution claims within its purview, mandating that "[s]uch claims *shall* be brought in accordance with this section." 42 U.S.C. § 9613(f)(1) (emphasis added).

CERCLA "expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107"). There is no cause to infer that Congress intended to displace all existing section 107 remedies of PRPs.

Furthermore, the Government's primary policy-based argument in support of its wholesale displacement theory has no force. The Government argues that SARA embodies congressional intent to discourage "unsupervised cleanups" by giving PRPs a right of cost recovery *only* in contribution under section 113, thus encouraging PRPs to settle with the government. Petr. Br. 13. But, perversely, the Government's position would foreclose any action for cost recovery by most PRPs that have conducted clean-up under the supervision of *state* authorities, even recovery against those actually responsible for the contamination. Given the predominance of state agency oversight in hazardous-waste clean-ups, such an intent cannot be imputed to Congress.

This Court must analyze the proper relationship of section 107(a) and section 113 in light of the respective roles of federal and state law in regulating clean-up of sites contaminated with hazardous substances. See *Transamerica Mortg. Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11, 19-20 (1979) (implied rights of actions are to be determined by analysis of express remedies). State environmental agencies supervise clean-up at the vast majority of such sites. Those state authorities have abatement powers not from CERCLA but only pursuant to state law. Congress clearly did not intend to deny cost recovery to PRPs who clean up hazardous wastes under the supervision of state authorities, as even the Government would apparently concede (see Petr. Br. 36-40). This Court cannot reasonably adopt a construction that would have that result.

A. State Environmental Agencies Regulate Hazardous Waste Clean-Up At Most Sites.

Any interpretation of CERCLA must begin with recognition of the sheer magnitude of the problem that confronted Congress in the late seventies. "In 1979 the EPA estimated that as many as 30,000 to 50,000 sites existed, of which between 1,200-2,000 present[ed] a serious risk to public health." H.R. Rep. No. 96-1016, pt. 1, at 18 (1980). Only six years later, as Congress was considering the Superfund Amendments and Reauthorization Act, there were an estimated 10,000 Superfund sites posing a serious risk to public health. H.R. Rep. No. 99-253, pt. 1, at 55. Because Congress recognized that the "EPA will never have adequate monies or manpower to address [all hazardous waste sites]," it anticipated that federal enforcement would concentrate on high priority sites. *Id.* To that end, section 105 requires the EPA to establish criteria for determining the priority of response actions, based on the relative risk to public health and the environment. 42 U.S.C. § 9605(a)(8)(A)-(B). Congress envisioned that EPA would respond directly only to "the nation's worst sites." S. Rep. No. 107-2, at 2 (2001).

The principal mechanism by which Congress promotes clean-up of hazardous wastes at other sites is through the creation of strict private liability for response costs under section 107. Cf. H.R. Rep. No. 96-1016, pt. 1, at 17 (noting the dual purpose of Congress to encourage prompt clean-up of hazardous-waste sites and to hold responsible parties liable for clean-up costs).

Importantly, CERCLA does not grant direct federal enforcement or abatement authority to the States, nor does the statute provide for general delegation of the program to the States. Under section 104, EPA may (but only rarely does) delegate federal authority to conduct response actions to any State capable of carrying out actions under that section, upon execution of a site-specific cooperative agreement with the EPA. 42 U.S.C. § 9604(d)(1). Finally, section 107(a) allows

a State to recover any clean-up costs it has incurred from a PRP. *Id.* § 9607(a)(4)(A). But States have no power under CERCLA to obtain money from the Superfund or to compel PRPs to conduct clean-up activities. Hence, Congress recognizes that "[t]he vast majority of contaminated sites across the Nation will not be cleaned up by the Superfund program. Instead, most sites will be cleaned up under State authority." S. Rep. No. 107-2, at 15.[7]

Various state laws create an extensive network of authority governing hazardous-waste site clean-up.[8] In a single year, States supervised more than four times as many clean-ups under various state laws as the EPA has supervised pursuant to CERCLA since its enactment in 1980.[9] This discrepancy results from the EPA's focus on a limited number of high priority sites; while the NPL contains about 1,200 sites, States have identified about 63,000 known or suspected sites. Envtl. L. Inst., *supra*, at 15. While laws vary from state to state, the majority of states have authorities analogous to the EPA's authority under CERCLA. *Id.* at 13. The various state programs generally provide for some combination of the following: emergency response actions, permanent remediation, a

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[7] States sometimes bring judicial actions with mixed abatement and cost-recovery claims under both state and federal law, without differentiating under which law its abatement authority arises. But States clearly have no authority to compel response actions under CERCLA.

[8] All 50 states, as well as the District of Columbia and Puerto Rico, have laws providing for authority over hazardous-waste sites. Envtl. L. Inst., *An Analysis of State Superfund Programs: 50-State Study, 2001 Update* 54-59 (Nov. 2002), *available at* http://www.elistore.org/reports_detail.asp?ID=10746.

[9] During fiscal year 2000, states completed more than 4,500 cleanups. Envtl. L. Inst., *supra*, at 7. By the end of FY 2000, states had conducted approximately 29,000 total cleanups. *Id.* Meanwhile, as of December 2006, the EPA had completed cleanup-phase construction at only 1,006 NPL sites. EPA, *Superfund National Accomplishments Summary Fiscal Year 2006* (Mar. 2007) *at* http://www.epa.gov/superfund/action/process/numbers06.htm.

fund or other financing mechanism, abatement authority to order PRPs to take action, and procedures providing for public participation. *Id.*

New Jersey was at the forefront of hazardous-waste site clean-up legislation. In 1976, the Spill Compensation and Control Act was codified.[10] N.J. Stat. Ann. § 58:10-23.11 *et seq*. The Act created a comprehensive scheme for cleaning up hazardous-waste sites and holding responsible parties liable. As is generally true under CERCLA, dischargers[11] are subject to strict, joint, and several liability. Under the Act, the State maintains a list of known contaminated sites, similar to CERCLA's NPL. *Id.* § 58:10-23.16. The Act creates a fund which the New Jersey Department of Environmental Protection ("NJDEP") may use to respond to discharges of hazardous waste. *Id.* § 58:10-23.11i. The NJDEP may then recover fund expenditures from dischargers. *Id.* § 58:10-23.11q. Finally, the Act allows one discharger to sue another for contribution. *Id.* § 58:10-23.11f.[12]

New York's law governing hazardous-waste site clean-up mirrors CERCLA in many respects. N.Y. Envtl. Conserv. Law § 27-1301 *et seq*. Indeed, the New York legislature enacted this statute as a complement to CERCLA, finding that "federal legislation would rely on state programs for the iden-

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[10] This New Jersey law was the model for CERCLA. Envtl. L. Inst., *supra*, at 11.

[11] Dischargers are defined as "any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance." N.J. Stat. Ann. § 58:10-23.11g(c)(1).

[12] In addition to the CERCLA-like Spill Act, New Jersey has a number of other laws relating to the cleanup of hazardous-waste sites. The Industrial Site Recovery Act requires owners or operators of an industrial establishment to obtain NJDEP approval before transferring industrial property or closing operations, effectively requiring cleanup of industrial properties before transfer. N.J. Stat. Ann. § 13:1K-6 *et seq*. In 1998, New Jersey enacted the Brownfields and Contaminated Sites Remediation Act. *Id.* § 58:10B. The Act allows the NJDEP to oversee and approve cleanup activities at sites that are not on state or federal priority lists. *Id.*

tification and management of inactive sites," and recognizing the need "to ensure that state and local governments will be prepared to implement those federal programs." 1979 N.Y. Sess. Laws 599, 600. The law provides for listing of priority sites, for financing of clean-ups with state funds, and for joint and several liability among PRPs. N.Y. Envtl. Conserv. Law § 27-1305; N.Y. State Fin. Law § 97-b; N.Y. Comp. Codes R. & Regs. tit. 6, § 375-2.2. However, like the majority of states,[13] New York does not have statutory provisions allowing private parties to bring contribution or cost recovery actions. Instead, only the New York State Department of Environmental Conservation can pursue an action against a PRP. See 2 Gerrard, *supra* § NY.04[2]. In addition to its state superfund law, New York oversees hazardous-waste site clean-up under its Brownfield Cleanup Program. N.Y. Envtl. Conserv. Law § 27-140[illegible] *et seq.*

Under New York's Superfund and Brownfield Cleanup Programs, remediation programs are selected by the NYSDEC (with input from the New York State Department of Health) based on the same criteria and hierarchy of preferred remedial strategies as CERCLA National Priority List sites. The NYSDEC is aggressive in its clean-up and enforcement efforts under the State Superfund law. Since state fiscal year 1985/1986, New York has issued a total of 1,128 orders on consent, requiring responsible parties to pay for or conduct remedial activities. See NYSDEC, *Annual Remedial Programs Report for State Fiscal Year 2005-06*, at iii (2006),

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[13] Many states enacted analogous statutes governing hazardous-waste site clean-up in the wake of CERCLA, although fewer than 15 states have statutory contribution provisions. *See generally* 2 Michael B. Gerrard, *Brownfields Law & Practice* §§ AL.01-WY.08 (2006) (state-specific chapters discussing state superfund laws). States presumably have not enacted such cost-recovery laws because PRPs were deemed to have full recourse under CERCLA. The following states provide some statutory right of action for private parties to recover cleanup costs: Arkansas, California, Delaware, Georgia, Hawaii, Indiana, Louisiana, Minnesota, Montana, New Hampshire, New Jersey, Oregon, Pennsylvania, and Utah. *Id.*

available at http://www.dec.state.ny.us/website/der/2006annualreport.pdf; NYSDEC, *Annual Remedial Programs Report for State Fiscal Year 2004-05*, at iv (2005), *available at* http://www.dec.state.ny.us/website/der/2005annualreport.pdf. As of March 31, 2006, the NYSDEC had completed remediation at a total of 487 sites listed on the State's priority list, with responsible parties contributing an estimated 68 percent of the costs – approximately $4.51 billion. NYSDEC, *supra*, at iii (2006). Additionally, cost-recovery actions brought by the State against PRPs during state fiscal year 2005/2006 accounted for $17.9 million in revenue for the NYSDEC. *Id.* at 4.

The importance of state direction and oversight in the clean-up of hazardous-waste sites is substantiated in the 2002 CERCLA amendments. Congress recognized the limitations of federal oversight under CERCLA when it adopted those amendments, noting that the "intent of the bill is to direct more public and private resources toward restoring contaminated properties that are not likely to be addressed by the Federal Government." S. Rep. No. 107-2, at 4. The Small Business Liability Relief and Brownfields Revitalization Act amended CERCLA in several important respects. The amendments added section 128, which prohibits the EPA from using its section 106 or section 107(a) authorities when a clean-up is being conducted pursuant to a qualified state program, with certain limited exceptions. 42 U.S.C. § 9628(b)(1)(A) & (B).[14] The amendments also added new section 105(h). *Id.* § 9605(h). Under that section, the EPA must defer listing a site on the NPL, at a State's request, if the site is undergoing clean-up activities pursuant to state law.

[14] The EPA may use its abatement powers if (1) the state requests EPA assistance; (2) the contamination has crossed state lines; (3) a release or threatened release may present an imminent and substantial danger to public health or the environment and additional actions are necessary to address the release; or (4) new information shows that the contamination poses a threat requiring further action. 42 U.S.C. § 9628(b)(1)(B).

Id. This provision was intended to "create a strong incentive for parties to agree to work with *State authorities* to clean up a site." S. Rep. No. 107-2, at 20 (emphasis added). These provisions evince Congress's intent that federal supervision pursuant to CERCLA be limited to high priority sites, while states oversee the vast majority of clean-up activities.[15]

B. Courts Have Interpreted Section 113(f)(3)(B) Narrowly To Provide A Contribution Remedy Only For The Limited *Federal* Liability Of A PRP To A State.

The Government attempts to draw support for its position from section 113(f)(3)(B), which grants a contribution remedy to "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement." 42 U.S.C. § 9613(f)(3)(B). The Government argues that Congress intended section 113 to be the exclusive remedy for PRPs, so as to encourage settlements with federal and state governments. Petr. Br. 26, 36-43. Indeed, the Government suggests that if a property owner wishes to recover clean-up costs from another PRP, it "need only enter into a settlement with the federal or state government," and then proceed under section 113(f)(3)(B). *Id.* at 43. The Government neglects the prevailing judicial construction of section 113(f)(3)(B), which would *not* provide the vast ma-

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[15] The Government repeatedly refers to "unsupervised cleanups," Petr. Br. 39, or "'wholly voluntary, unsupervised, *sua sponte* cleanup operation[s],'" *id.* at 41. This characterization of clean-up activities as pure voluntarism is misleading. While there are undoubtedly cleanups conducted with no government oversight or approval, state laws addressing hazardous-waste site cleanup are extensive, as discussed above, and the majority of cleanups (including the clean-up performed by Con Edison in the *Consolidated Edison* case before the Second Circuit) are conducted with state agency oversight. Precluding those PRPs working under a state settlement or cooperation agreement—with comprehensive state supervision—from maintaining a cost recovery action would not encourage such settlements.

jority of PRPs who settle or otherwise cooperate with state authorities *any* remedy to recover response costs.

Despite the prevalent role of states in hazardous waste clean-up, many courts have interpreted this section narrowly to allow contribution actions only when a PRP has resolved its *federal* CERCLA liability to a State. See, *e.g.*, *Consolidated Edison*, 423 F.3d at 95-96; *Differential Dev.-1994, Ltd.* v. *Harkrider Distrib. Co.*, No. H-05-3375, 2007 WL 87661 (S.D. Tex. Jan. 9, 2007); *Raytheon Aircraft Co.* v. *United States*, 435 F. Supp. 2d 1136 (D. Kan. 2006); *W.R. Grace & Co.* v. *Zotos Int'l, Inc.*, No. 98-CV-838S(F), 2005 WL 1076117 (W.D.N.Y. May 3, 2005); *City of Waukesha* v. *Viacom Int'l Inc.*, 404 F. Supp. 2d 1112 (E.D. Wis. 2005); *General Time Corp.* v. *Bulk Materials, Inc.*, 826 F. Supp. 471 (M.D. Ga. 1993).

Courts adopting this view have reasoned that "the right to contribution under section 113(f)(3)(B) is defined by the scope of the liability resolved." *Raytheon*, 435 F. Supp. 2d at 1144. They have disallowed a section 113(f)(3)(B) action when the clean-up was conducted pursuant to a voluntary state program, *Differential Dev.-1994*, 2007 WL 87661, at *8-9, and prohibited contribution actions where federal CERCLA liability is not resolved in the state settlement agreement, *General Time*, 826 F. Supp. at 474-76. The Second Circuit based its narrow interpretation of section 113(f)(3)(B) on the statutory use of the term "response action." *Consolidated Edison*, 423 F.3d at 95-96. The court reasoned that because a response action is a "*CERCLA*-specific term," and such an action is a prerequisite to a contribution action under section 113(f)(3)(B), only settlements resolving federal CERCLA liability to a State may provide the basis for a section 113(f)(3)(B) suit. *Id.*

If section 113(f)(3)(B) grants a PRP a right in contribution to recover only the response costs for which it has *federal* liability to a State under CERCLA, it is a very narrow remedy. As discussed above, a PRP is liable to a State under CERCLA

only when the State itself expends resources in conducting a clean-up. 42 U.S.C. § 9607(a)(4)(A) (PRPs are liable for "all costs of removal or remedial action *incurred by ... a State* ... not inconsistent with the national contingency plan") (emphasis added). The State has no abatement power under CERCLA, and thus a PRP has no liability under CERCLA to a State comparable to the PRP's liability under section 106 to the United States. See *id.* § 9622(c)(1) & (2). Thus, under the prevailing judicial interpretation that section 113(f)(3)(B) applies only to a PRP's settlement of its *federal* liability to a State (*i.e.*, only to its liability for response costs that have been or would be incurred by the State itself), the contribution remedy of section 113(f)(3)(B) is extremely limited. There would be no section 113(f)(3)(B) contribution remedy for the many PRPs who (like Con Edison) incur *their own response costs* pursuant to voluntary cooperation agreements or settlements with state regulatory agencies under state law. Indeed, the Second Circuit so held in ruling that the release and covenant-not-to-sue in Con Edison's VCA resolved only state law liability, and thus Con Edison had no remedy under section 113(f)(3)(B). *Consolidated Edison*, 423 F.3d at 92-93.

In spite of the Second Circuit's narrow interpretation of section 113(f), it did not bar Con Edison from recovering its costs from UGI; rather it is one of a number of courts that have allowed PRPs to recover clean-up costs under section 107(a). *Id.* at 97-100; *Raytheon Aircraft*, 435 F. Supp. 2d at 1145-51; *Viacom, Inc.* v. *United States*, 404 F. Supp. 2d 3, 6-7 (D.D.C. 2005); *City of Bangor* v. *Citizens Commc'ns Co.*, 437 F. Supp. 2d 180, 220 (D. Me. 2006). Indeed, this Court has noted that section 107(a) "unquestionably provides a cause of action for private parties to seek recovery of cleanup costs." *Key Tronic Corp.*, 511 U.S. at 818. The section 107(a) cause of action "impliedly authorizes private parties to recover cleanup costs from *other* PRP's." *Id.* (emphasis added). Based on the plain language of section 107(a), the Second Circuit held that Con Edison could maintain a cost

recovery action against UGI because Con Edison is a person for purposes of CERCLA, 42 U.S.C. § 9601(21), and it incurred "costs of response" associated with a "removal" and "remedial action." *Consolidated Edison*, 423 F.3d at 99. If the Government's contrary position carries the day, and PRPs are barred from instituting cost recovery actions under section 107(a), those PRPs working with state authorities to clean up contaminated sites will be left with no avenue to collect their response costs from other PRPs.

C. The Express Contribution Remedies Of Section 113(f) Are Complementary To The Implied Rights Of Action Under Section 107(a).

The right answer is the one arrived at by the court of appeals below. Section 107(a) allows PRPs to maintain a private right of action to recover response costs, and the section 113 remedies are complementary to section 107(a) remedies (displacing them only *pro tanto*). Pet. App. 17a. In enacting SARA, Congress dispelled uncertainty over whether the implied private right of action of section 107(a) included an implied right of contribution once a PRP's CERCLA liability has been established by judgment or settlement, since contribution remedies are not readily implied in federal statutes. *Cooper*, 543 U.S. at 162; *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 638-47 (1981). Congress's intent in SARA was to broaden the availability of cost recovery actions, not to restrict them.

In this vein, the Government's wholly misconceives the legislative history regarding SARA's promotion of negotiated clean-ups. The Government is right that SARA was meant to "encourage private party settlements and cleanups. . . . Private parties may be more willing to assume financial responsibility for some or all of the cleanup if they are assured that they can seek contribution from others." H.R. Rep. No. 99-253, pt. 1, at 80. But Congress achieved that goal by giving certainty to private parties that settling with state or federal authorities would not extinguish their right to cost recovery

from other PRPs. To eliminate doubt as to whether an implied right of contribution under section 107(a) exists in that circumstance, Congress created an express right of action in section 113(f) for contribution. See H.R. Rep. No. 99-253, pt. 3, at 20 (1985) (Congress specifically "included this provision to encourage settlements and to avoid problems that might otherwise arise due to the courts' reluctance to imply new private rights of action under federal statutes") (discussing the need for an explicit provision allowing a settlor to seek contribution from a non-settlor). Section 113(f) ensured that no PRP settling with federal or state authorities would have to bear the entire burden of response costs for which another PRP is justly held responsible in part.

If the Court adopts the correct view of section 113 as complementary to section 107(a) – either creating a new remedy where one could not be implied under section 107(a), or displacing existing section 107(a) remedies *pro tanto* – it need not at this time resolve the substantive scope of section 113(f)(3)(B). Every PRP would have a private right of action to recover response costs, either under section 107(a) or (when it applies) section 113(f). The boundaries between 107(a) and 113(f) would be a matter for the lower courts.

However, if this Court were to contemplate the Government's narrow construction of section 107(a) (despite the flaws outlined above, *supra* at 11-14), it must grapple with the substance of the express remedy of section 113(f)(3)(B). It is unfathomable that Congress would have intended a highly restrictive implied right of action under section 107(a) *and* a highly restrictive express right of contribution under section 113(f)(3)(B). There is simply no plausible interpretation of CERCLA that would exclude PRPs working closely with state authorities under a voluntary clean-up or settlement agreement from maintaining cost-recovery actions against other PRPs.

If *arguendo* the Government were correct that section 107(a) affords a private right of action only to "innocent" par-

ties, at a minimum that could only be so if section 113(f)(3)(B) conferred a broad contribution remedy on settling parties. As noted above, *supra* at 23, courts that have construed section 113(f)(3)(B) restrictively have generally read the phrase "person who has *resolved its liability to* the United States or *a State* for some or all of a response action," 42 U.S.C. § 9613(f)(3)(B) (emphases added), to refer to the PRP's *CERCLA* liability. See, *e.g.*, *Consolidated Edison*, 423 F.3d at 95 ("We read section 113(f)(3)(B) to create a contribution right only when liability for CERCLA claims, rather than some broader category of legal claims, is resolved."). But that is by no means a necessary or even a preferred reading of the statutory language. When Congress meant to refer strictly to federal liability under CERCLA, it knew how to do so with specificity. See, *e.g.*, 42 U.S.C. § 9613(f)(1) (referring to persons "liable or potentially liable under section 9607(a) of this title"); *id.* § 9622(c)(2)(A) (noting that provision does not affect "[t]he liability of any person under section 9606 or 9607 of this title"); *id.* § 9622(f)(1) (referring to covenants not to sue "concerning any liability to the United States under this chapter"). Section 113(f)(3)(B), however, refers only to the resolution of "liability," without any qualification as to the legal basis for the liability. Given Congress's awareness that most hazardous waste clean-up would occur under state law, the natural reading of this section is that Congress granted an express contribution remedy to any one who has resolved "some or all" of his liability to a State, regardless of the type of claim that the State could have brought to enforce that liability. *Id.* § 9613(f)(3)(B). Section 113(f)(3)(B) allows a person potentially liable in a state abatement action to enter into an agreement with a State to "respond" to a hazardous-waste site by performing a "removal" or "remedial action" under CERCLA, *id.* § 9601(23)-(25), and then seek contribution for those response costs from another responsible party.

This Court need not venture down this path of construing section 113(f), because (for all the foregoing reasons) the Government's construction of section 107(a) is too flawed to command allegiance. The proper interpretation of sections 107(a) and 113(f) – and all that is necessary to resolve this case – is that they afford complementary remedies, and the latter displaces the former only *pro tanto*.

D. Recognition Of An Implied Right Of Action For PRPs Under Section 107(a) Creates No Anomalies.

The Government seeks to defeat this common-sense construction of CERCLA by arguing that recognizing an implied right of action in favor of PRPs would create various anomalies. None of its arguments has force.

First, the Government argues that recognition of a section 107(a) implied right of action would nullify the section 113(f) remedy because the former has a longer statute of limitations. Petr. Br. 30-31; see 42 U.S.C. § 9613(g)(2) & (3). But that argument is based on the Government's false supposition that a PRP who qualifies for a section 113(f) remedy may elect to proceed under section 107(a) as an alternative. See Petr. Br. 32-33. There is no warrant for implying a right of action where Congress has given a specific express remedy. A PRP only has a section 107(a) remedy until a section 113(f) remedy accrues: *i.e.*, until there is a "judgment in any action under this chapter for recovery of such costs or damages," or "an administrative order" under section 122 or "a judicially approved settlement with respect to such costs or damages." 42 U.S.C. § 9613(g)(3)(A) & (B).[16] A PRP cannot rely on the

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[16] A claim for contribution may be asserted "during or following any civil action under section 9606 of this title or under section 9607(a) of this title." 42 U.S.C. § 9613(f)(1). A contribution claim brought by a PRP "during" a civil action against it – but prior to any judgment or settlement of liability against that PRP – would be a contingent counterclaim, cross claim, or third-party claim anticipating the possibility of a subsequent judgment or settlement of liability. *See* Fed. R. Civ. P. 13(a), (b), (c) &

longer statute of limitations for section 107(a) actions once a section 113(f) right of action accrues.

Second, the Government suggests that recognition of a section 107(a) action in favor of PRPs is unfair to other PRPs at the site who have already settled with the government. "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." *Id.* § 9613(f)(2). The Government reasons that the section 113(f)(2) settlement bar only applies to contribution actions under section 113(f)(1) or (3), but not section 107(a) cost-recovery actions; therefore the latter should not be implied. Petr. Br. 31. Even if *arguendo* the Government's interpretation of section 113(f)(2) – which is controversial and beyond the scope of this brief – were correct, the federal courts have latitude in section 107(a) to recognize an implied settlement bar defense parallel to section 113(f)(2) if necessary to the proper implementation of CERCLA.[17]

Third and finally, the Government contends that it would be anomalous "to permit a PRP to pursue an action against another PRP for joint and several liability under Section 107(a) in lieu of an action under Section 113(f), which permits recovery only for an equitable share of the costs." *Id.* But this Court has not held that joint and several liability is inexorably applied in section 107(a) actions, *Cooper Industries*, 543 U.S. at 169-70 (leaving open whether a plaintiff "may pursue a § 107 cost recovery action for some form of liability other than joint and several"), and indeed, in the years after CERCLA was enacted, courts have rejected a rigid application of joint and several liability under section 107. See *Allied Corp.*

14(a) (discussing claims that another party "may be liable").

[17] Moreover, this argument does not aid the Government. Under its theory of section 113(f)(2), the section 107 actions it endorses (those brought by innocent parties) could likewise be brought against settling PRPs, and the prior settlement could not be invoked as a defense.

v. *Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1116 (N.D. Ill. 1988) ("*regardless of the indivisibility of the harm*, where the peculiar facts of the case point to a more fair apportionment of liability [the court may reject application of joint and several liability].") (emphasis added); *United States* v. *Hardage*, 116 F.R.D. 460, 465-66 (W.D. Okla. 1987); *United States* v. *A & F Materials Co.*, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984). Recognizing that small contributors may not be able to prove divisible harm, one court held that compulsory application of joint and several liability "must be avoided because both Houses of Congress were concerned about the issue of fairness, and joint and several liability is extremely harsh and unfair if it is imposed on a defendant who contributed only a small amount of waste to the site." *Id.* (applying so-called "Gore Amendment" factors to apportion liability); see also *Allied Corp.*, 691 F. Supp. at 1116-18 (citing use of Gore factors with approval). Thus, in adjudicating implied rights of action for cost recovery under section 107a, courts have modified joint-and-several liability to permit a just apportionment of damages consistent with the novel legal liability regime created by CERCLA.

The only true anomaly would be the one created by the Government's position, where PRPs who incur costs remediating or removing hazardous substances are barred in many circumstances from recovering those costs even from more culpable parties who are equally liable under CERCLA.

CONCLUSION

This Court should affirm the judgment below.

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April 4, 2007

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(7)

FILED
MAR 1 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-562

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF COOPER INDUSTRIES, LLC, MEADWESTVACO CORPORATION AND UGI UTILITIES, INC. IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE* [1]

Amici are currently involved in significant CERCLA litigation. That litigation, in conjunction with decades of participation in CERCLA's remedial scheme, has allowed *amici* to develop a unique and robust understanding of CERCLA's application and the practical implications of this Court's impending decision.

Cooper Industries, LLC ("Cooper") is a leading manufacturer of electrical products, tools and hardware headquartered in Houston, Texas. As the successful petitioner in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004) – the remanded case that focused national attention on the issue presented here – Cooper has been at the center of the evolving debate regarding private-party CERCLA claims. In that case, the Court held that CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1), "authorizes contribution claims only 'during or following' a civil action under § 106 or § 107(a)," 543 U.S. at 168, and remanded for consideration of the "question whether Aviall has waived [its right to a § 107] claim and the underlying § 107 question (if it is not waived)," *id.* at 169.

Since that decision, Aviall amended its complaint to assert § 107 theories that were dismissed in an August 8, 2006 opinion by Judge Fitzwater of the United States District Court for Northern District of Texas.[2] That matter is now

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[1] By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae* and their counsel.

[2] *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 63 E.R.C. 1623 (N.D. Tex. 2006). Because Judge Fitzwater's decision presents an exceptionally clear and compelling analysis of the issue before this Court, a copy of that opinion is set forth in the attached appendix to this brief. App. 1a.

pending before the United States Court of Appeals for the Fifth Circuit and will be directly affected by the decision in this case.

UGI Utilities, Inc. ("UGI") is a natural gas and electric utility headquartered in Reading, Pennsylvania. UGI's alleged predecessors owned stock in numerous companies that in turn owned or operated manufactured gas plants in the late 1800's and early 1900's prior to the passage of the Public Utility Holding Company Act, under which virtually all such interests were required to be divested. Thus, UGI's interests as *amicus* arise both as a corporation that has been sued and which has been largely victorious under CERCLA (*see* n.4, *infra*) and as the petitioner for a writ of certiorari to the United States Court of Appeals for the Second Circuit on virtually the same § 107 question as is presented here.[3]

In the Second Circuit case, UGI was sued by Consolidated Edison Company of New York, Inc. ("Con Ed") under CERCLA and state law over the cleanup of sites that allegedly were contaminated by operations at coal gas plants from 1887 to 1904. Con Ed claimed that UGI and its predecessors were past owners and operators of the plants and therefore liable under CERCLA. After suing UGI, Con Ed entered into a Voluntary Cleanup Agreement with the State of New York to clean up the sites.

The Second Circuit affirmed dismissal of a number of Con Ed's claims against UGI on grounds that the past owners or operators involved were corporations distinct from UGI.[4]

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[3] *UGI Utils., Inc. v. Consol. Edison Co., petition for cert. filed*, No. 05-1323 (filed Apr. 14, 2006). The government asked the Court to hold consideration of UGI's petition pending resolution of this case. Brief for the United States as *Amicus Curiae*, No. 05-1323, at 2.

[4] *Consol. Edison Co. v. UGI Utils., Inc.*, 153 Fed. Appx. 749 (2d Cir. 2005); *see also Atlanta Gas Light & Gas Co. v. UGI Utils., Inc.*, 463 F.3d 1201 (11th Cir. 2006) (affirming summary judgment for UGI on operator liability claims).

The Second Circuit also affirmed dismissal of Con Ed's contribution claim against UGI under § 113(f)(3)(B), because the Voluntary Cleanup Agreement was not an agreement that "resolved its liability to the United States or a State," which is a prerequisite to such a claim. *Consol. Edison Co. v. UGI Utils., Inc.*, 423 F.3d 90, 97 (2d Cir. 2005). However, with respect to one operator liability claim, the Second Circuit reversed and allowed Con Ed to pursue a § 107 claim for joint and several liability against UGI, holding that, especially in the wake of *Cooper Industries*, a party that has not yet been sued or made to participate in an administrative proceeding is allowed to use § 107 to recover cleanup costs incurred voluntarily. 423 F.3d at 102. UGI's petition for a writ of certiorari to review that holding is pending.

Finally, *amicus* MeadWestvaco Corporation ("MeadWestvaco") is a global packaging company with worldwide operations that is headquartered in Glen Allen, Virginia. MeadWestvaco has extensive CERCLA experience at sites nationwide including a sixteen-year-old matter currently pending before the Third Circuit for the third time. *See Beazer East, Inc. v. Mead Corp.*, 412 F.3d 429 (3d Cir. 2005). MeadWestvaco also is involved in another complex CERCLA proceeding in which plaintiffs are attempting to override a federal grant of contribution protection under CERCLA § 113(f)(2) using the § 107 claim theories at issue in this case.

SUMMARY OF THE ARGUMENT

CERCLA fully serves its intended purpose without the expanded private-party claim theories advanced below. CERCLA's available remedies do not need augmentation with new § 107 cost recovery or contribution rights for liable parties. The "intent" and the "policy" advanced by those who advocate a more expansive reading of CERCLA are served by the statute as it stands.

Expanding § 107 claims to provide liable parties with remedies that are not grounded in the text and structure of

CERCLA will bring unintended and unnecessary complications that will undermine CERCLA's cleanup incentives and divert parties' and courts' resources from cleanup to litigation. As it stands, CERCLA envisions – and delivers – government supervised cleanup, while also ensuring that the considerable power of CERCLA will rarely be brought to bear on private parties like *amici* without underlying government involvement.

At the time this Court issued its decision in *Cooper Industries*, all courts of appeals to consider the issue had held "that a private party that is itself a PRP may not pursue a § 107(a) action against other PRPs for joint and several liability." *Id.*, 543 U.S. at 169 (citations omitted). Yet, even though "covered parties" listed under CERCLA § 107(a)(1)-(4) (i.e., "PRPs") were barred from bringing § 107 claims, provisions including the contribution mechanisms available under § 113(f) made CERCLA "a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites," while "those actually responsible for any damage, environmental harm, or injury from chemical poisons may be tagged with the cost of their actions." *United States v. Bestfoods*, 524 U.S. 51, 55 (1998) (citations and bracketing omitted). *See also Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996) ("the two main purposes of CERCLA are prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party") (citations and quotation marks omitted).

There is no need, however, to create a new § 107 remedy in order to advance those aims. CERCLA provides ample incentives and tools for private parties to carry out beneficial government-supervised cleanups, without reading in a new remedy not found in the text. Indeed, the § 107 remedy envisioned by the court of appeals would actually work as a disincentive to private cleanup in many circumstances and would certainly discourage cooperation and settlement with EPA.

Undoubtedly, *Cooper Industries* surprised some PRPs when the Court insisted, logically, that the plain language of § 113(f) be applied to determine when a contribution remedy is available. The plaintiff PRP in this action, which had remediated a site and expected to sue other PRPs for contribution – but had not carefully observed the prerequisites for a contribution claim – found that after *Cooper Industries* it was "foreclosed from using § 113. This path is barred because Atlantic [Research] – like Aviall – commenced suit before, rather than 'during or following,' a CERCLA enforcement action." *Atl. Research Corp. v. United States*, 459 F.3d 827, 835 (8th Cir. 2006) (quoting. § 113(f)(1)). The plaintiff in the Second Circuit case still before this Court on a petition for certiorari faced similar barriers. *Consol. Edison*, 423 F.3d at 97 (plaintiff PRP had failed to satisfy prerequisites for a contribution claim under § 113(f)(3)(B)).

But individual PRPs' difficulties in perfecting their contribution claims after *Cooper Industries* do not justify creating a new remedy – especially given the consequences of that new remedy. One such consequence is already apparent: in creating their new cause of action under § 107, the Second and Eighth Circuits fashioned a new category of "voluntary" PRPs that is nowhere anticipated in CERCLA's text. If endorsed by this Court, that judicial alteration will bring new layers of factual issues into already complex and burdensome CERCLA litigation.

By upsetting the carefully crafted contribution provisions of § 113(f), the court of appeals' new § 107 PRP remedy will impair the government's interests and those of private parties, will result in additional inefficient litigation, and will increase, not reduce, uncertainty regarding when cost recovery is available. Properly read, CERCLA does not provide this remedy, and the remedies it does provide sufficiently serve the statutory goals of remediation and responsibility.

ARGUMENT

I. CERCLA § 107(a) DOES NOT CREATE ANY RIGHT FOR LIABLE PARTIES TO INDEPENDENTLY PURSUE PRIVATE CLAIMS.

A. PRPs Are Specifically Excluded From Pursuing Direct Cost-Recovery Claims Under § 107(a)(4)(B).

Section 107(a) establishes four categories of responsible parties and then provides that they shall be liable for certain government costs and "any other necessary costs of response incurred by any other person...." The plain meaning of this text is apparent through its double use of the word "other." The first instance of "other" refers to the type of costs at issue and distinguishes them from costs incurred by the government and recoverable under § 107(a)(4)(A).

What then of the second "other"? Under the Eighth Circuit's reading – that PRPs may assert § 107 cost recovery claims – that second "other" would be rendered superfluous and would merely duplicate the same distinction that the first already accomplished. In contrast, the United States' reading properly gives life to both "others" by confirming that the sentence refers to those "other" than the covered "persons" (i.e., PRPs) described in § 107(a)(1)-(4) above. Read properly, § 107(a)(4)(B) establishes liability for costs "other" than governmental costs by persons "other" than PRPs.

B. The Evolution of CERCLA § 107(a)(4)(B) Directly Supports That Section's Plain Language.

The evolution of § 107(a)(4)(B) confirms that exact textual meaning. The House of Representatives and the Senate initially offered very different solutions to the environmental concerns that CERCLA addresses. The House authored H.R. 7020, 96th Cong. (Sept. 23, 1980), which

would only have permitted suit by "[t]he Administrator, or any other such governmental entity to which a person is liable under this section for the recovery of costs...." *Id.* at § 3071. In contrast, the Senate Environmental and Public Works and Finance committees reported S. 1480, 96th Cong. (Nov. 18, 1980). That bill contained dramatically broader liability provisions including the predecessor to CERCLA § 107(a)(4)(B). Among other things, it would have permitted private parties to recover "all damages for economic loss or loss due to personal injury or loss of natural resources resulting from such a discharge, release, or disposal...." *Id.* at § 4(a)(iv)(2).

There was substantial controversy over the breadth of the liability provisions in these conflicting bills. For example, the "Stafford-Randolph Superfund Substitute," which was introduced one month before CERCLA's enactment, was intended to "eliminate those features which have proven most controversial," such as "a third party cause of action for damages, including medical expenses and economic loss...." 126 Cong. Rec. 29,699 (daily ed. Nov. 14, 1980) (statement of Sen. Stafford). Extensive negotiations regarding the scope of liability and other measures ensued. *See, e.g.*, 126 Cong. Rec. 30,349 (daily ed. Nov. 20, 1980).

Ultimately, the Senate responded by adopting far narrower liability provisions in a revised version of H.R. 7020. That revised version – which was subsequently adopted by the House of Representatives and enacted into law – made two key changes. First, in keeping with the compromise position of a narrower private liability scheme, the Senate deleted those provisions that would have permitted broad private recovery of damages and economic loss. H.R. 7020, 96th Cong. § 107 (Nov. 24, 1980).

Second, and of critical import here, the Senate rewrote CERCLA § 107(a)(4)(B) into its final form. In the previous version of S. 1480, the predecessor to that section would have created liability for "any other costs or expenses

incurred by ***any person*** to remove a hazardous substance...." S. 1480, 96th Cong. § 4(a)(4)(B) (Nov. 18, 1980) (emphasis added). In contrast, the new Senate version of H.R. 7020 provided for liability of "any other necessary costs of response incurred by ***any other person***...." H.R. 7020, 96th Cong. § 107(a)(4)(B) (Nov. 24, 1980) (emphasis added).

This evolution directly contradicts the Eighth Circuit's premise that the phrase "'any other person' means any person other than the statutorily enumerated 'United States Government or a State or an Indian tribe.'" *Atl. Research*, 459 F.3d at 835. While making various changes to sharply limit the scope of private rights under CERCLA, the Senate added the crucial second "other" to § 107(a)(4)(B). That addition in such a context evidences a plain intent to restrict the broad preceding version, which would have permitted recovery "by any person." Simply put, ***the change from "any person" to "any other person" means that some "persons" were meant to be left out***. Where Congress was acting to otherwise sharply limit private rights, it is clear who was meant to be excluded – the categories of private parties described in the preceding § 107(a)(1)-(4). Their rights were addressed with the contribution provisions of § 113(f), which were enacted in 1986.

In contrast, the predecessors to § 107(a)(4)(A)–(B) in S. 1480 were wholly adequate to separate private claims from claims afforded to public entities. They distinguished "costs of removal" incurred "by the United States Government or a state" from "any other costs or expenses incurred by any person." *Id.* If the Senate only meant to establish a category of claims separate from government claims, the changes in its adoption of H.R. 7020 would have been unnecessary. By adding further qualification, Congress accomplished its broader expressed goal of narrowing private rights by limiting § 107(a)(4)(B) to persons "other" than those deemed culpable under § 107(a)(1)–(4).

C. THE PRIMARY ROLE OF CERCLA IS TO FURTHER GOVERNMENT CLEANUP, ENFORCEMENT, SETTLEMENT AND OVERSIGHT.

The United States' plain reading of § 107(a)(4)(B) and Congress' changes to that section to limit private rights are fully consistent with CERCLA's true role – enhancement of government authority to address contaminated sites. Congress was faced with the problem that private parties were undertaking little or no remedial action. It responded not by granting rights to those responsible for the pollution (as the Eighth Circuit implicitly suggests),[5] but rather by strengthening federal response and enforcement powers. Specifically, CERCLA provided the United States with "'the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal.'" *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (quoting *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982)).[6]

CERCLA's text readily illustrates that its various provisions created badly needed public enforcement authority to clean up contaminated sites and, as necessary, to compel private parties to cooperate in such efforts. *See, e.g.*, 42 U.S.C. § 9604(a) (federal removal of hazardous substances); 42 U.S.C. § 9604(e) (federal demand for information relevant to hazardous substance contamination); 42 U.S.C. § 9606(a)

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[5] *See Atl. Research*, 459 F.3d at 837 (suggesting that CERCLA was enacted to "encourag[e]" the "voluntary cleanup of contaminated sites").

[6] *See also Bestfoods*, 524 U.S. at 55, *United States v. Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988); *Witco Corp. v. Beckhuis*, 38 F.3d 682, 688 (3d Cir. 1994); *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420 (7th Cir. 1994); *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1340 (9th Cir. 1992); *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir. 1991); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 (11th Cir. 1989).

(administrative remediation orders); 42 U.S.C. § 9606(b) ($25,000 daily fine for non-compliance with federal order); 42 U.S.C. § 9607(a)(4)(A) (cost recovery actions); 42 U.S.C. § 9607(e) (barring agreements to protect PRPs from cost recovery claims); 42 U.S.C. § 9607(f) (natural resources liability). In contrast, the Eighth Circuit attempts to draw its inference of a broad purpose to promote voluntary cleanup from just one statutory sentence – § 107(a)(4)(B).

CERCLA's legislative history further affirms that enforcement – not voluntary private remediation – was Congress' principal focus. Congressman Florio, in describing the legislation, stated: "Both Houses addressed the key concerns which had to be dealt with in hazardous substance legislation" by ensuring that "the Government has been given the necessary authority to respond to hazardous substance releases." 126 Cong. Rec. 31,964 (daily ed. Dec. 3, 1980). Similarly, Senator Leahy, remarking on the legislation, stated that CERCLA was designed to ensure that "the Federal Government's ability to respond to incidents involving hazardous and highly toxic substances will be greatly strengthened." *Id.* at 30,971 (Nov. 24, 1980); *see also id.* (Senator Chafee observing that CERCLA was intended to provide "a tool for holding liable those who are responsible for these costs").

Nor did Congress' subsequent authorization of contribution claims under the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. 99-499, 100 Stat. 1613, alter this equation. Congress did not enact the focused rights existing under § 113(f) to further cleanups of the sort performed by Atlantic Research here, Con Ed in the Second Circuit case, or Aviall Services in the Fifth Circuit proceeding. Rather, it provided a proportionate private party ***response*** to enforcement action where such enforcement created uneven liability. In other words, SARA limited the side-effects of CERCLA's joint and several liability scheme. As stated by the Senate Committee on Environment and Public Works upon reporting the bill that became law, "when

joint and several liability *is imposed* under Section 106 or 107 of the Act, *a concomitant right of contribution* exists under CERCLA." *See* 99 Cong. Sen. Rep. 11 at *44 (emphasis added). That says nothing of voluntary remediation.

The contribution rights created by Congress directly enhance federal remedial and enforcement efforts. Presuming § 107(a) is read properly, § 113(f)(3)(B) strongly encourages private entities to enter into "administrative or judicially approved settlement[s]" by creating a right to contribution for those who cooperate. § 113(f)(3)(B). Congress further lured liable parties to acquiesce to government demands by providing the "carrot" of contribution protection for settling parties. *See* § 113(f)(2). Those provisions create limited private rights only in response to government action.

This Court's decision in *Cooper Industries* corrected the courts that had strayed from § 113(f)(1)'s statutory text by attempting to broaden it into a general private cause of action. That same guidance is now necessary in the context of § 107(a). The Eighth Circuit's approach would once again unbalance CERCLA's "cause and effect" statutory scheme. Instead of limiting private cost recovery claims to parties "other" than PRPs, it would broaden that right to anyone and everyone. Such an approach would permit parties deemed legally responsible under CERCLA to bypass Congress' express restrictions in § 113(f) and instead use CERCLA to first suppose and then resolve inequities that the statutory scheme did not create. As aptly described by the United States, Br. for U.S. at 36-46, permitting covered persons under § 107(a)(1)-(4) to avoid Congress' contribution scheme through the creation of a new cost recovery action would significantly impair (rather than advance) enforcement activity.[7]

[7] The effect that enabling almost limitless § 107 claims would have on state law also supports a limited reading of § 107. The court below

II. A NEW § 107 RIGHT WOULD RESULT IN NEEDLESS UNCERTAINTY AND UNFAIR EXPOSURE FOR DEFENDANT PRPS.

A PRP cost-recovery claim will damage CERCLA's statutory structure and burden defendant PRPs with additional, protracted CERCLA litigation over the scope and application of that claim. The primary structural harm involves § 113(f), which will no longer provide the incentives and protections it promises because a PRP cost-recovery claim under § 107 offers a far more powerful remedy than a § 113 contribution claim. Section 107(a) makes each PRP strictly liable for the *entire* cleanup cost. In contrast, § 113(f) provides for contribution claims that allocate costs among PRPs based on "equitable factors," § 113(f)(1), and carry a shorter limitations period. *Compare* §§ 113 (g)(2) & (g)(3); 9613(g)(2) & (g)(3).

The court of appeals contends that its new § 107 claim is needed to prevent the government from evading liability. *See Atl. Research*, 459 F.3d at 837. But this is factually unwarranted, *see* Br. for U.S. at 44-45, and ignores the effects that creating such a claim will have on CERCLA cases in which the United States is not potentially liable, including cases in which *amici* are involved. In most cases, the court of appeals' concern will have no bearing.

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opined that "CERCLA effectively transformed centuries of real property and tort liability law by making those who contaminate a site strictly liable for the costs of subsequent cleanup by others...." *Atl. Research*, 459 F.3d at 830 (citations omitted). If Congress had meant to eradicate fundamental contract, property and tort jurisprudence in all circumstances – rather than in a limited subset involving government enforcement – there would certainly have been mention of that fact in CERCLA's statutory text and legislative history. There is not, and that silence is telling.

The first untoward side-effect of manufacturing a new § 107 PRP claim would be the creation of a powerful incentive for PRPs to avoid settling with the government in order to remain "voluntary" and thus ensure eligibility for the new right of cost recovery. This runs sharply contrary to CERCLA's primary goal of enhancing public enforcement and oversight. *See* Section I.C., *supra*. "Voluntary" PRPs would attempt to use the new § 107 cost recovery claim to circumvent the statutory protection afforded persons that settle with the government. *See* §§ 113(f)(2) & 122(g)(5). PRPs that would otherwise settle to "buy peace" and achieve finality may not if they would face new demands under the theory that the protection of § 113(f)(2) extends only to "claims for contribution" and not those for "cost recovery."

Amicus MeadWestvaco is involved in just such a case, *Solutia, Inc. v. McWane*, No. CV-03-PWG-1345-E, which is pending before the United States District Court for the Northern District of Alabama. MeadWestvaco is among a group of settling companies that agreed to conduct a removal action at a site in Anniston, Alabama. As a part of that settlement, MeadWestvaco received contribution protection from the government under § 113(f)(2). Yet despite that protection, MeadWestvaco and the other settling parties have been sued on the precise § 107(a)(4)(B) theory now before this Court. Such claims will greatly deter settlement and preclude further cooperative remedial efforts under proper EPA supervision.

Second, the expected allegation that the new § 107 cost recovery claim would shift the entire remediation cost to each defendant, jointly and severally, is inconsistent with the pro rata allocation that § 113 provides. The Second and Eighth Circuits attempt to resolve this conflict by suggesting that the liabilities would be allocated equitably through § 113 contribution counterclaims. *Conol. Edison*, 423 F.3d at 100 n.9; *Atl. Research*, 459 F.3d at 835. But that tactic does not solve the core inequalities created by the proposed new claim. Section § 107 plaintiffs will argue that the burden of

proof for proper allocation has shifted to the defendants instead of falling on the plaintiff as it would in a § 113 action. Section 107 plaintiffs would also contend that, under the rule of joint and several liability, the defendant must assume the "orphan shares" attributed to insolvent or missing PRPs. Further, if the PRP plaintiff settled with the government and obtained contribution protection under § 113(f)(2), it would no doubt contend it was wholly immune from the defendant's § 113(f) contribution counterclaims.

Thus, a PRP § 107 claim would impose substantial unfair burdens on defendants, especially those whose involvement with a site was long ago and poorly documented. *Amicus* UGI Utilities is an exemplar: it was sued over events that took place more than a century ago. If this Court allows the PRP § 107 claim created by the court of appeals, the lower courts will have to resolve whether defendants like UGI must bear the burden of proving the extent of the parties' involvement, even though the party suing has admitted its partial responsibility for the cleanup and even though such defendants will be hobbled by documentation and witnesses lost as a result of the long passage of time.

Because the cleanup for which a § 107 claim would seek recovery is, by definition, completed without government oversight, the tools available to the § 107 plaintiff could also result in costs being imposed upon defendants for a cleanup that was inefficient, incomplete or overbroad. A plaintiff PRP's incomplete "voluntary" cleanup could be ordered redone by the government at some later date, with the defendant PRPs that paid for the first cleanup unfairly tapped to pay for a second.

It might be tempting as a matter of policy to argue that a § 107 claim would encourage prompt cleanup by bestowing cost-recovery rights on PRP plaintiffs that are denied to PRP defendants. *See Consol. Edison*, 423 F.3d at 102 (only a party that "has not been sued" may use § 107).

But, aside from the inefficiencies that would result from this sort of race to the courthouse, that policy would necessarily be inequitable. There is only one PRP – the landowner – that is in a position to conduct voluntary cleanup. Landowners are not likely to grant access to former owners or waste disposers to conduct a cleanup, especially if it means the landowner would then be subject to the type of § 107 claim the Eighth Circuit envisions. Even if it were consistent with the text and Congress' meaning, the Eighth Circuit's new § 107 right would thus create further inequities by empowering only a limited subset of PRPs, at the expense of those who are unable to conduct a "voluntary" cleanup. Those who are left out would find themselves targeted in lawsuits without the benefits of government-supervised cleanup, the restriction of a shorter statute of limitations under § 113(g) and the shelter of contribution protection under § 113(f)(2).

Wholly apart from these inconsistencies, a PRP cost-recovery claim would create numerous new factual and legal quagmires to be litigated, thus consuming parties' and courts' limited resources. For example, the "voluntary" limitation that the courts below have grafted onto their newly-minted § 107 right (which has no statutory basis but is created to prevent the complete displacement of § 113(f)) would raise another nebulous issue for further litigation: Which plaintiffs are "voluntary"? As the Second Circuit itself has already conceded, this "makes relevant . . . whether and to what extent plaintiffs incurred response costs voluntarily . . . [which] is of course a question of fact," *AMW Materials Testing, Inc. v. Town of Babylon*, No. 05-206-CV, 2006 WL 851772, at *1 (2d Cir. Mar. 28, 2006) (unpublished summary order). Whether a putative § 107 PRP plaintiff is only "partly responsible," *Atl. Research*, 459 F.3d at 829, or "did not pollute the site in any way," *Metro. Water Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 836 (7th Cir. 2007), are the sorts of factual questions that would be litigated at length under a new § 107 structure.

Additional questions will arise in determining whether parties that are conducting voluntary cleanups under the "Brownfields Program" and protected from government action, *see* 42 U.S.C. § 9628(b), would qualify for § 107 claims against others and, if so, under what circumstances. Conversely, will parties who thought themselves entitled to that protection find themselves facing § 107 claims? Limiting § 107(a) claims to some but not all PRPs, as the Second and Eighth Circuits have suggested, would mean that simply establishing CERCLA liability will no longer suffice as the threshold finding in a CERCLA lawsuit. Rather, parties will be required to litigate factual questions over the *circumstances* of liability, substantially increasing the burdens on parties and courts alike.

* * * *

Allowing new § 107 rights would prompt additional rounds of costly litigation to establish metes and bounds for the new cause of action, mirroring the two decades of litigation that already have been devoted to establishing the limits of Congress' § 113 remedy. Many of those issues could not be addressed here, because this case does not present, for example, the need to reconcile multiple § 107 claims asserted by PRPs or the scope of contribution protection for a PRP that has settled with the government. This would impose a substantial additional burden on the federal judiciary and give rise to repeated requests for this Court to resolve many new issues in the years to come.

There is no justification for imposing these burdens on courts and litigants. As the government has aptly described, CERCLA's text and structure amply serve Congress' goals of remediation and responsibility. Upsetting the remedies and structure Congress chose is not, contrary to the court of appeals' conclusion, justified by the (mis)perceived goal of maximizing "voluntary" cleanups:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (emphasis in original). Because the new § 107 claim crafted by the courts below is contrary to the statute's text, inconsistent with its structure and purpose, and burdensome to administer, the creation of that claim is unwarranted and ill conceived.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

Civil Action No. 3:97-CV-1926-D

TEXAS, DALLAS DIVISION AVIALL SERVICES, INC.,
Plaintiff-counterdefendant,

vs.

COOPER INDUSTRIES, LLC,
Defendant-counterplaintiff.

August 8, 2006, Decided
August 8, 2006, Filed

MEMORANDUM OPINION AND ORDER

The court must decide whether a private potentially responsible person ("PRP") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, can bring a cost recovery or contribution action under *CERCLA* § 107(a) or under federal common law against another PRP. The court holds that it cannot.

I

The court assumes the parties' familiarity with the background facts and extensive procedural history of this case. It therefore briefly summarizes the case and adds pertinent background facts and procedural history to assist in understanding today's decision. Cooper owned four sites at which it operated an aircraft engine maintenance business. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 163, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004). In 1981 it sold the

business to Aviall, who later discovered that both Aviall and Cooper has contaminated the soil and groundwater at the sites with hazardous substances. *Id.*[1] Aviall later sold the properties but retained contractual liability for the cleanup.

During the period when Aviall was the owner, it notified the Texas Natural Resource Conservation Commission ("TNRC") of the pollution. *Id.* at 164. TNRC advised Aviall that it was violating state environmental laws, directed it to clean up the site, and threatened enforcement action if Aviall failed to undertake remediation. *Id.* Aviall voluntarily cleaned up the properties, and neither the Environmental Protection Agency ("EPA"), TNRC, nor any other governmental entity has undertaken judicial or administrative measures against Aviall or Cooper. *Id.* No third party has sued Aviall or Cooper concerning any of the conditions or the facilities.

Aviall sued Cooper in this court seeking to recover the cleanup costs it had expended and those that it anticipated incurring in the future. *Id.* It asserted claims for cost recovery under *CERCLA* § 107(a), for contribution under *CERCLA* § 113(f)(1), and for a declaratory judgment under the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and it alleged various pendent state-law claims.[2] *Id.* Aviall amended

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[1] One of the four sites is contaminated with petroleum hydrocarbons, and the parties have stipulated that Aviall does not seek to hold Cooper liable under CERCLA for the cleanup costs incurred at this site.

[2] Aviall sought relief based on theories of breach of contract; breach of express warranty; contractual indemnification; declaratory judgment; contribution under *CERCLA* § 113(f)(1); contribution under § 361.344(a) of the Texas Solid Waste Disposal Act, *Tex. Health & Safety Code Ann.* § 361.344(a) (Vernon 1992 & Supp. 2000); contribution under § 26.3513(j) *of the Texas Water Code, Tex. Water Code Ann.* § 26.3513(j) (Vernon 1998 & Supp.2000); quantum meruit; and attorney's fees. *See Aviall Servs., Inc. v. Cooper Indus., Inc.*, 2000 U.S. Dist. LEXIS 520, 2000 WL 31730, at *1 (N.D.Tex. Jan. 13, 2000) (Fitzwater, J.), *rev'd*, 312 F.3d 677 (5th Cir. 2002) (en banc), *rev'd*, 543 U.S. 157, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004).

its complaint, dropping the independent § 107(a) claim and alleging instead under § 113(f)(1) that it was entitled to seek contribution from Cooper as a PRP under § 107(a) for response costs and other liability. *Id.*

Both parties moved for summary judgment, and the court held that Aviall could not maintain a § 113(f)(1) claim because it had not alleged any prior or pending CERCLA enforcement action against it. *See Aviall Servs., Inc. v. Cooper Indus., Inc.*, 2000 U.S. Dist. LEXIS 520, 2000 WL 31730, at *4 (N.D. Tex. Jan. 13, 2000) (Fitzwater, J.), *rev'd*, 312 F.3d 677 (5th Cir. 2002) (en banc), *rev'd*, 543 U.S. 157, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004). The court dismissed the claim without prejudice. *Id.* The CERCLA claim was the sole basis for the court to exercise subject matter jurisdiction (the parties are not diverse). Having dismissed that claim on the merits, the court declined in its discretion to exercise supplemental jurisdiction over Aviall's pendent state-law causes of action. *Id.* at *5.

Although a panel of the Fifth Circuit initially affirmed,[3] the *en banc* Fifth Circuit reversed, holding that § 113(f)(1) authorizes a PRP to seek contribution from other PRPs for cleanup costs when no civil action has been brought under § 106 or § 107(a). *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677, 691 (5th Cir. 2002) (en banc), *rev'd*, 543 U.S. 157, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004). The Supreme Court granted certiorari, *Cooper Industries, Inc. v. Aviall Services, Inc.*, 540 U.S. 1099, 124 S. Ct. 981, 157 L. Ed. 2d 811 (2004), and reversed and remanded, holding that § 113(f) "authorizes contribution claims only 'during or following' a civil action under § 106 or § 107(a), and it is undisputed that

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[3] *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 263 F.3d 134 (5th Cir. 2001), *reh'g granted en banc*, 278 F.3d 416 (5th Cir. 2001), *rev'd*, 312 F.3d 677 (5th Cir. 2002) (en banc), *rev'd*, 543 U.S. 157, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004).

Aviall has never been subject to such an action." *Cooper Indus.*, 543 U.S. at 168.

Aviall and amicus Lockheed Martin Corporation contended in the Supreme Court that if Aviall could not recover under § 113(f), it could do so under § 107(a), despite its PRP status. Id. The Court noted that neither this court, the Fifth Circuit panel, nor the en banc Fifth Circuit had considered a § 107(a)claim. *Id.* It concluded that both the § 107(a) claim and the question whether Aviall had waived the claim "merit[ed] full consideration by the courts below." Id. at 169 ("Both the question whether Aviall has waived this claim and the underlying § 107 question (if it is not waived) may depend in part on the relationship between §§ 107 and 113."). Accordingly, the Court remanded for further proceedings consistent with its opinion. Two justices dissented, stating that the Court "unnecessarily defers decision on Aviall's entitlement to recover cleanup costs" under § 107. *Id.* at 171-72 (Ginsburg, J., dissenting). The dissenting justices indicated that they viewed § 107 as providing a cause of action for PRPs to recover from other PRPs. *See id.*

On remand to the Fifth Circuit, the *en banc* court ordered the case remanded to this court "with instructions to permit Aviall . . . to amend its complaint, if necessary, to assert, free of any challenge of waiver or forfeiture, whatever statutory claims it urges in light of the Supreme Court's decision, without prejudice to Cooper['s] . . . other defenses." *Aviall Servs., Inc. v. Cooper Indus., Inc.*, No. 00-10197, order at 1-2 (5th Cir. Feb. 15, 2005) (en banc) (order).[4]

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[4] In response to the Fifth Circuit's order, Cooper filed in the Supreme Court a petition for a writ of mandamus. It maintained that the Fifth Circuit contravened the Supreme Court's mandate "when, without the benefit of any substantive briefing or argument, [the Fifth Circuit] issued a remand order to 'permit Aviall . . . to amend its complaint . . . free of any challenge of waiver or forfeiture' despite [the Supreme] Court's express determination that the 'preliminary waiver question' should, on re-

Under the Fifth Circuit's order, this court permitted Aviall to file its third amended complaint ("third complaint").[5] Aviall sues Cooper on theories of cost recovery under CERCLA § 107(a), 42 U.S.C. § 9607(a), for response costs incurred or to be incurred under CERCLA; in the alternative, contribution under CERCLA § 107, 42 U.S.C. § 9607; common law contribution under state and federal law to recover its response costs attributable to Cooper; contribution under the Texas Solid Waste Disposal Act, Tex. *Health & Safety Code Ann.* § 361.344(a) (Vernon 2001 & Supp. 2005); contribution under the Texas Water Code, *Tex. Water Code Ann.* § 26.3513(j) (Vernon 2000 & Supp. 2005); breach of contract; breach of warranty; contractual indemnification; declaratory judgment; quantum meruit; and attorney's fees. Cooper asserts two counterclaims. First, it seeks contribution under *CERCLA* § 113(f)(1) to the extent there have been any releases or threatened releases of hazardous substances within the meaning of § 107(a). Second, Cooper sues for contractual indemnification, release, and breach of contract under Texas law.

The parties have filed several substantive motions, but the one logically addressed first is Cooper's motion for partial

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mand from [the Supreme] Court, receive 'full consideration by the courts below.'" Pet. for Writ of Mandamus, *In re Cooper Indus., Inc.*, 544 U.S. 1031, 125 S. Ct. 2255, 161 L. Ed. 2d 1081 (2005) (No.04-1182). Pending disposition of the petition in the Supreme Court, this court stayed the proceedings until the Supreme Court denied mandamus on May 16, 2005. *See id.*

[5] Cooper "respectfully recognizes that the Fifth Circuit's instruction allowing Aviall to assert CERCLA statutory claims 'free of any challenge of waiver or forfeiture' precludes this Court from further addressing Cooper's strong waiver defenses to Aviall's renewed *CERLA* § 107(a) claims at this time." D. Br. 3 n.3. Although Aviall contends it "never dropped its § 107(a) [claim], . . . this point is moot," "[g]iven the Fifth Circuit's mandate." P. Br. 2. Pursuant to the Fifth Circuit's order, the court will not address the waiver issue.

summary judgment on all federal claims. If as a matter of law Aviall cannot recover against Cooper under CERCLA or federal common law, the court will as before dismiss Aviall's federal-law claims and decline to exercise supplemental jurisdiction, and the parties can continue this litigation in state court based on state law. Cooper maintains that Aviall cannot bring a cost recovery action under *CERCLA* § 107(a) because it is a PRP and that Aviall has no right of contribution under § 107(a) or federal common law. It argues that Aviall must seek contribution under § 113(f)(1), at the time when such an action can be maintained.[6]

II

The court decides first whether Aviall can bring a cost recovery action under § 107(a).

A

The parties contend this question has already been decided in this circuit. Cooper points to three decisions that it argues foreclose Aviall's claim. It cites the panel majority's opinion in *Aviall Services*, in which it observed that "[t]he § 107(a) cost recovery provision permits the government or an 'innocent' private party to recoup cleanup costs from PRPs." *Aviall Servs.*, 263 F.3d at 137. Cooper relies on the panel's conclusion that "a PRP cannot file a § 107(a) suit against another PRP; it must pursue a contribution action instead." *Id.* Under Fifth Cir. R. 41.3, however, "[u]nless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate." The *en banc* court in *Aviall Services* did not adopt an exception to this Rule in abrogating the panel opinion. Accordingly, although perhaps suggestive of the views of some members of the Fifth Circuit, the panel

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[6] Of course, under the Supreme Court's decision in *Cooper Industries*, such an action would presently be premature, because Aviall has not yet been subjected to a civil action under § 106 or § 107(a) of *CERCLA*.

decision in *Aviall Services* is not binding and does not foreclose Aviall from asserting a right to bring a cost recovery action under § 107(a).

Cooper also relies on *OHM Remediation Services v. Evans Cooperage Co.*, 116 F.3d 1574 (5th Cir. 1997). In OHM Remediation the Fifth Circuit reversed a summary judgment, holding, *inter alia*, that "section 113(f) contribution actions may only be brought by persons who are liable or potentially liable under CERCLA." *Id.* at 1582. The appellee had asserted three independent grounds for affirming the appellant's § 107(a) claim that the district court had not addressed. *Id.* at 1583. One ground was that, because the appellant was a PRP, it could not bring an action under § 107(a). *Id.* The Fifth Circuit declined to reach all three grounds, noting that they "involve[d] difficult questions of fact regarding the extent of cleanup and the nature of [appellant's] involvement with the site." *Id.* Cooper argues that the panel "acknowledged that the determination of [the appellant's] historic[al] 'involvement with the site'—i.e., the factual question of whether [the appellant] was a PRP or an 'innocent party'—would be dispositive of its ability to bring a § 107(a) cost recovery claim." D. Br. 6. The court rejects Cooper's construction of *OHM Remediation*. The panel explicitly expressed "no opinion on the separate question . . . whether a PRP may seek to hold other parties jointly and severally liable under § 107(a) for response costs." *OHM Remediation*, 116 F.3d at 1582 n.1. It is that question, which the *OHM Remediation* panel did not decide, that this court resolves today.

Finally, at oral argument, Cooper contended the Fifth Circuit's recent decision in *Elementis Chromium L.P. v. Coastal States Petroleum Co.*, 450 F.3d 607 (5th Cir. 2006), forecloses a PRP from bringing a cost recovery action under § 107(a). It cites language in which the panel explicitly agreed with the following holding of the Eleventh Circuit: "'[W]hen one liable party sues another liable party under CERCLA, the action is not a cost recovery action under

§ 107(a). . . .'" *Id.* at 613 (quoting *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1513 (11th Cir. 1996)). The court disagrees with Cooper's reliance on *Elementis*. In *Elementis* the panel cited *Redwing Carriers* for the proposition that liability must be allocated under § 113(f)(1), that is, liability is not joint and several. Id. Indeed, *Elementis* held only that liability under § 113(f) is several, and it did not squarely decide whether a private PRP can bring a cost recovery action against another PRP under § 107(a).

B

For its part, Aviall maintains that the Fifth Circuit in *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988), expressly allowed a PRP to recover under § 107(a). It urges that since *Tanglewood* was decided, the Fifth Circuit has consistently recognized the right of PRPs to bring cost recovery actions under § 107(a). *See Aviall Servs.*, 312 F.3d at 683; *Geraghty & Miller, Inc. v. Conoco Inc.*, 234 F.3d 917 (5th Cir. 2000); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989). The court disagrees. Although the question whether one PRP can bring a § 107(a) cost recovery claim against another PRP may have been "lurk[ing] in the record" in those cases, none squarely considered or decided it. *See Webster v. Fall*, 266 U.S. 507, 511, 45 S. Ct. 148, 69 L. Ed. 411 (1925) ("Questions which merely lurk in the record . . . are not to be considered as having [*15] been so decided as to constitute precedents.").

In *Tanglewood* the court granted an interlocutory appeal under 28 U.S.C. § 1292(b) for the limited purpose of determining whether the district court erred in rejecting defendants' motion to dismiss. *Tanglewood*, 849 F.2d at 1571. One argument that the appellant advanced on appeal was that some degree of governmental involvement was a necessary prerequisite for the application of § 107. *Id.* at 1575. In affirming the district court, the Fifth Circuit held, *inter alia*, that the plaintiffs, who were homeowners who had

purchased residential lots in a housing subdivision, had stated a claim for relief under § 107, because no "prior governmental involvement is a prerequisite to the recouping of response costs." *Id.* The court did not discuss, for instance, whether the plaintiffs qualified for the "innocent landowner defense" under § 107(b)(3) and thus were not PRPs. The possibility that the plaintiffs were PRPs was not mentioned in the opinion, much less litigated by the parties. *Cf. id.* at 1572-74 (deciding whether defendants were PRPs). Accordingly, *Tanglewood* did not decide the issue presented here.

Likewise, the other cases that Aviall cites do not support its contention that this question has been resolved. Even if the cases contain language that implicitly appears to endorse Aviall's view, none of the decisions expressly addressed the question whether a PRP could bring a cause of action under § 107. There is no indication that the issue was brought to the attention of the court or ruled on. The courts addressed distinct, even if related, questions regarding CERCLA. *See Aviall Servs.*, 312 F.3d at 682-83 (addressing whether PRPs could seek contribution from other PRPs under § 113); *Geraghty & Miller*, 234 F.3d at 924-25 (addressing which CERCLA statute of limitations applied to initial contribution action); *Amoco Oil*, 889 F.2d at 668 (addressing whether PRP was required to show that property's radioactive emissions violated quantitative threshold to establish release of hazardous substance within meaning of § 107(a)(4)).[7]

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[7] Aviall also urges that the Supreme Court's decision in *Key Tronic Corp. v. United States*, 511 U.S. 809, 114 S. Ct. 1960, 128 L. Ed. 2d 797 (1994), recognized an independent cause of action for PRPs under § 107. *Key Tronic* addressed whether a PRP could claim attorney's fees in a contribution action brought against another PRP. It did not involve the question presented to this court: whether a private PRP can bring a § 107(a) cost recovery action against another PRP. *See also Cooper Indus.*, 543 U.S. at 170 ("[W]e are not prepared—as the dissent would have it—to resolve the § 107 question solely on the basis of dictum in *Key Tronic*.").

In sum, "[t]he Fifth Circuit has not directly addressed the issue of precisely who may bring a claim under § 107(a)." *Vine Street LLC v. Keeling*, 362 F.Supp.2d 754, 763 (E.D. Tex. 2005).[8] Cooper's motion squarely presents that issue and the question whether Aviall can sue for cost recovery or contribution under CERCLA or federal common law.

III

The court now decides whether Aviall, a private PRP, can bring a cost recovery action against Cooper under § 107(a).

A

"The appropriate starting point when interpreting any statute is its plain meaning." *United States v. Elrawy*, 448 F.3d 309, 315 (5th Cir. 2006) (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989)). "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *Ron Pair Enters.*, 489 U.S. at 242 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S. Ct. 3245, 73 L. Ed. 2d 973 (1982)).

Section 107(a) provides, in relevant part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

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[8] The court of course respectfully disagrees with the conclusion of the able district court in *Vine Street* that a PRP can bring a cost recovery action under § 107(a), even though the court did so "in the unique circumstances of th[at] case." *Vine Street*, 362 F.Supp.2d at 761.

> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who acceptsor accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan. . . .

42 U.S.C. § 9607(a).

Cooper contends the second use of the word "other" in § 107(a)(4)(B)—"any other person"—serves to distinguish from the other persons identified in the preceding text of § 107(a) those who can bring a cost recovery action under § 107(a). It maintains that § 107(a)(4)(B)'s reference to "any other person" "naturally means anyone not previously identified in this section of the statute." D. Br. 8. The effect of this interpretation is to limit § 107(a) actions to the persons listed in § 107(a)(4)(A)—the United States Government, a State, or an Indian Tribe—and persons who are not PRPs. Cooper reasons that because Aviall concedes it is a PRP within the meaning of § 107(a), Aviall does not qualify as

one of the "other" persons who can bring a § 107(a) cost recovery action.

Aviall counters that, properly interpreted, the "any other person" to which § 107(a)(4)(B) refers includes anyone who is not designated in § 107(a)(4)(A), i.e., anyone other than the United States Government, a State, or an Indian Tribe, including PRPs. It contends that because it is not the United States Government, a State, or an Indian Tribe, it falls within the class of "any other person" under § 107(a)(4)(B) who can bring a cost recovery action under § 107(a).

The parties also support their respective interpretations of § 107(a)(4)(B) by examining CERCLA as a whole. This is a proper approach. It is settled that to determine "the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *KMart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 100 L. Ed. 2d 313 (1988) (citing *Bethesda Hosp. Ass'n. v. Bowen*, 485 U.S. 399, 403-405, 108 S. Ct. 1255, 99 L. Ed. 2d 460 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-221, 106 S. Ct. 2485, 91 L. Ed. 2d 174 (1986)). "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001)). The court "must, if possible, construe a statute to give every word some operative effect." *Cooper Indus.*, 543 U.S. at 167 (citing *United States v. Nordic Vill., Inc.*, 503 U.S. 30,35-36,112 S. Ct. 1011, 117L. Ed. 2d 181 (1992)).

B

The court discerns the meaning of "any other person" in § 107(a)(4)(B) by examining CERCLA holistically. Here, the court need only consult provisions of CERCLA—particularly

those found in § 113(f)—to see that Cooper's reading of CERCLA is correct and Aviall's misplaced.

Under § 113(f)(2), "[a] party who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." *See also* § 122(g)(5) ("A person who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement."), § 122(h)(4) (same). Under § 113(f)(3)(B),

> [a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement. . . .

Id. The effect of these provisions is that

> PRPs, who choose to settle, gain protection from contribution, enjoy potentially favorable settlement terms, and retain the ability to seek contribution from other defendants. PRPs, who choose not to settle, are barred from seeking contribution from the settling PRPs and thus face potentially disproportionate liability. This system gives the United States obvious and important leverage to encourage quick and effective resolution of environmental disputes.

In re Reading Co., 115 F.3d 1111, 1119 (3d Cir. 1997).

Were the court to interpret § 107(a) as Aviall does, a PRP could bring a cost recovery action under § 107(a) against a person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement and, under § 113(f)(2), for example, would not be liable for claims for contribution regarding matters addressed in the

settlement. But because, unlike § 113(f), a claim under § 107 is not for contribution, the settling person would not be entitled to the protection of § 113(f)(2). *See Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 352 n.11 (6th Cir. 1998) ("[W]ere we to allow PRPs to seek joint and several cost recovery under § 107(a), they could do so against parties who had settled, and against whom they were precluded from seeking contribution. . . . Obviously such a result would be absurd. . . ."); *Reading*, 115 F.3d at 1119 (noting risk that "[c]onsent agreements would no longer provide protection, and settling parties would have to endure additional rounds of litigation to apportion their losses"). Thus Aviall's interpretation of § 107(a) would at a minimum render key provisions of § 113(f) superfluous, insignificant, or, in some instances, devoid of operative effect, violating a cardinal principle of statutory construction. *See TRW Inc.*, 534 U.S. at 31; *see also Cooper Indus., 543 U.S. at 167* (admonishing courts to "construe a statute to give every word some operative effect") (citing *Nordic Vill.*, 503 U.S. at 35-36).[9] The court therefore concludes that "any other person" in § 107(a)(4)(B) does not include persons who are PRPs under § 107(a)(1)-(4).

C

This understanding of the plain meaning of § 107(a)(4)(B) is supported by well-reasoned precedent. Before the Supreme Court decided Cooper Industries, all the circuits that had

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[9] Cooper maintains, *inter alia*, that recognizing Aviall's claim would provide a § 107(a) claimant a longer period of limitations and a lower standard of proof. "CERCLA contains different statutes of limitations for section 107(a) cost-recovery actions and for section 113 contribution actions." *Geraghty & Miller*, 234 F.3d at 923-24 (citing § 113(g)(2)(B) and 113(g)(3)). Cooper is therefore correct that another consequence of recognizing a direct cost recovery action under § 107(a) by one private PRP against another PRP is to enlarge the limitations period that Congress envisioned for filing what are essentially actions for contribution.

addressed the question had concluded that, except for so-called "innocent" PRPs,[10] § 107(a) does not confer on a PRP a claim for cost recovery or contribution against another PRP. These circuits held that § 113(f)(1) explicitly provides PRPs a right of contribution and § 107(a) does not. *See Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525, 530-31 (8th Cir. 2003); *Morrison Enters. v. McShares, Inc.*, 302 F.3d 1127, 1135 (10th Cir. 2002);[11] *Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 191 F.3d 409, 415 (4th Cir. 1999); *Centerior Serv. Co.*, 153 F.3d at 356; *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997); New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1124 (3d Cir. 1997);[12] *Redwing Carriers*, 94 F.3d at 1496; *United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 101 (1st Cir. 1994); *Akzo Coating, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994). Admittedly, the cases involved slightly different factual scenarios than does this one. In all but one—*Pinal Creek Group*, 118 F.3d at 1301—the PRPs seeking relief under § 107(a) had either been held liable or

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[10] *See NutraSweet Co. v. X-L Eng'g Co.*, 227 F.3d 776, 784 (7th Cir. 2000) (holding "innocent" PRP, who "did not pollute the site in any way," was entitled to bring cost recovery action against PRP under § 107); *Rumpke of Ind., Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1240 (7th Cir. 1997) (holding "innocent" PRP who was not subject to government order or judgment could bring § 107 cost recovery action against PRP); *Akzo Coating, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994) (noting that "innocent" PRPs may bring § 107 claims in certain instances).

[11] *See Morrison Enters.*, 302 F.3d at 1135 n.2 ("We . . . do not reach the question of whether our analysis would change if a PRP was unable to pursue an action for contribution and would therefore be barred from any recourse under CERCLA."); *see also United States v. Col. & E. R.R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995) (holding cross-claim by PRP, defendant in suit by EPA, against other PRP properly characterized as § 113 rather than § 107 cause of action).

[12] *See also N.J. Tpk. Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 104 (3d Cir. 1999) (observing PRP's suit against other PRPs properly characterized as one for contribution under § 113).

had been the subject of an administrative or court order or judgment. *See Consol. Edison Co. of N.Y. v. UGI Utils., Inc.*, 423 F.3d 90, 102-03 (2d Cir. 2005) (citing cases). Unlike Aviall, the PRPs would presumably have had a § 113(f) contribution action available to them.

Aviall attempts to distinguish these cases on the basis that they were premised on the undisputed right of PRPs to seek cost recovery under CERCLA. It fails, however, to identify the parts of the opinions that relied on the fact that PRPs had an undisputed right to cost recovery. Moreover, the reasoning of the opinions cited the text of CERCLA, its statutory structure, and congressional intent in concluding that PRPs could not bring claims under § 107(a). *See, e.g., Pinal Creek*, 118 F.3d at 1301 ("The text of § 107 leads to the conclusion that only a claim for contribution lies between PRPs."); *Centerior Serv.*, 153 F.3d at 350 n.11 ("[P]arties seeking contribution under § 113(f) must look to § 107 to establish the basis and elements of the liability of the defendants, as well as any defenses to that liability."); *United Techs. Corp.*, 33 F.3d at 102 ("[A]ppellants' construction emasculates the contribution protection component of CERCLA's settlement framework.").

As has this court, several decisions focused on the relationship between §§ 107(a) and 113(f) in concluding that § 113(f)—not § 107(a)—is the statutory mechanism for a PRP to recover necessary response costs. *See Centerior Serv. Co.*, 153 F.3d at 352 ("Our reading of the statute limiting the PRP plaintiffs to contribution, gives meaning to the language in § 107(a) referring to any person, as well as the explicit contribution provisions found in § 113(f)."); *Pinal Creek*, 118 F.3d at 1302 ("[W]hile § 107 created the right of contribution, the 'machinery' of § 113 governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 107. . . ."); *New Castle County*, 111 F.3d at 1122 ("[S]ection 113 does not in itself create any new

liabilities; rather, it confirms the right of a potentially responsible person under section 107 to obtain contribution from other potentially responsible persons."). This court agrees with these decisions to the extent they conclude that, although § 107 creates the general liability scheme, e.g., by identifying the relevant parties, §§ 107 and 113 create two distinct remedies. Nothing in *Cooper Industries* calls into question this understanding of the relationship between §§ 107 and 113, as described in the pre-Cooper Industries circuit case law.

D

The court recognizes that since *Cooper Industries* was decided, the courts that have addressed this question are divided.[13] This court, which undoubtedly will not have the

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[13] *Compare Consol. Edison Co.*, 423 F.3d 90 (allowing PRP to bring § 107(a) claim), *petition for cert. filed*, 74 U.S.L.W. 3600 (U.S. Apr. 14, 2006) (No. 05-1323); *City of Bangor v. Citizens Commc'ns Co.*, 2006 U.S. Dist. LEXIS 44967, 2006 WL 1868332 (D. Me. June 27, 2006) (same); *Raytheon Aircraft Co. v. United States*, 435 F. Supp. 2d 1136, 2006 WL 1517762 (D. Kan. May 26, 2006) (same); *Sunnyside Dev. Corp. v. Opsys U.S. Corp.*, 2006 U.S. Dist. LEXIS 26655, 2006 WL 1128039 (N.D. Cal. Apr. 27, 2006) (same); *McDonald v. Sun Oil Co.*, 423 F.Supp.2d 1114 (D. Or. 2006) (same); *Aggio v. Estate of Aggio*, 2005 U.S. Dist. LEXIS 37428, 2005 WL 2277037 (N.D. Cal. Sept. 19, 2005) (same), *appeal docketed*, No. 06-15989 (9th Cir. May 30, 2006); *Ferguson v. Arcata Redwood Co.*, 2005 U.S. Dist. LEXIS 18015, 2005 WL 1869445 (N.D. Cal. Aug. 5, 2005) (same); *Viacom, Inc. v. United States*, 404 F.Supp.2d 3 (D.D.C. 2005) (same); *Kotrous v. Goss-Jewett Co. of N. Cal.*, 2005 U.S. Dist. LEXIS 18013, 2005 WL 1417152 (E.D. Cal. June 16, 2005) (same); *Adobe Lumber, Inc. v. Taecker*, 2005 U.S. Dist. LEXIS 15374, 2005 WL 1367065 (E.D. Cal. May 24, 2005) (same); *Metro. Water Reclamation Dist. of Greater Chi. v. Lake River Corp.*, 365 F.Supp.2d 913 (N.D. Ill.) (same), *appeal docketed*, No. 05-3299 (7th Cir. Aug. 4, 2005); *Vine Street*, 362 F.Supp.2d 754 (same) with *Spectrum Int'l Holdings, Inc. v. Universal Coops., Inc.*, 2006 U.S. Dist. LEXIS 49716, 2006 WL 2033377 (D. Minn. July 17, 2006) (holding that PRP has no cause of action under § 107(a)); *Adobe Lumber, Inc. v. Hellman*, 2006 U.S. Dist. LEXIS 8564, 2006 WL 349697 (E.D. Cal. Jan. 4) (same),

final word on this question, has reached the conclusion that § 107(a) does not confer on a private PRP a statutory right to bring a cost recovery action. Congresscreated a separate remedy in § 113(f)—the contribution provision—for private PRPs to recover response costs from other PRPs. Because Aviall concedes that it is a PRP, it is relegated to bringing an action against Cooper under § 113(f), after the conditions for doing so have been met.[14] If this interpretation of CERCLA leaves a remedial gap that Congress thinks it wise to fill, it can do so by amending CERCLA.

IV

The court considers next whether Aviall can bring a contribution claim against Cooper under § 107(a) or federal common law.

In *Cooper Industries* the Supreme Court noted that, after CERLCA was enacted but before it was amended by the

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appeal docketed, No. 06-16019 (9th Cir. June 7, 2006); *R.E. Goodson Constr. Co. v. Int'l Paper Co.*, 2005 U.S. Dist. LEXIS 42909, 2005 WL 2614927 (D.S.C. Oct. 13, 2005) (same); *Montville Twp. v. Woodmont Builders, LLC*, 2005 U.S. Dist. LEXIS 18079, 2005 WL 2000204 (D.N.J. Aug. 17, 2005) (same); *City of Rialto v. U.S. Dep't of Def.*, 2005 U.S. Dist. LEXIS 26941 (C.D. Cal. Aug. 16) (same), *appeal docketed*, No. 05-56749 (9th Cir. Nov. 22, 2005); *Boarhead Farm Agreement Group v. Advanced Envtl. Tech. Corp.*, 381 F.Supp.2d 427 (E.D. Pa. 2005) (same); *Blue Tee Corp. v. ASARCO, Inc.*, 2005 U.S. Dist. LEXIS 15360, 2005 WL 1532955, at *6 (W.D. Mo. June 27, 2005) (same); *Atl. Research Corp. v. United States*, 2005 U.S. Dist. LEXIS 20484 (W.D. Ark. June 1) (same), *appeal docketed*, No. 05-3152 (8th Cir. Aug. 8, 2005); *City of Waukesha v. Viacom Int'l Inc.*, 362 F.Supp.2d 1025 (E.D. Wis. 2005) (same); *Mercury Mall Assocs. v. Nick's Mkt., Inc.*, 368 F.Supp.2d 513 (E.D. Va. 2005) (same). Before the Second Circuit decided Consolidated Edison, district courts in the circuit had concluded that PRPs were barred from bringing § 107(a) claims. *See, e.g., Elementis Chems., Inc. v. TH Agric. & Nutrition*, LLC, 373 F.Supp.2d 257 (S.D.N.Y. 2005).

[14] In view of this conclusion, the court need not reach Cooper's alternative summary judgment contention that Aviall has not met the National Contingency Plan requirements for asserting such a claim.

Superfund Amendments and Reauthorization Act ("SARA"), "[a] number of District Courts nonetheless held that, although CERCLA did not mention the word 'contribution,' such a right arose either impliedly from provisions of the statute, or as a matter of federal common law." *Cooper Indus.*, 543 U.S. at 162 (collecting cases). The Court observed that this "conclusion was debatable in light of two decisions of this Court that refused to recognize implied or common-law rights to contribution in other federal statutes." *Id.* (citing *Tex. Indus., Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 638-47, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981) (declining to recognize implied or common-law contribution right under *Sherman Act or Clayton Act*); *Nw. Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 90-99, 101 S. Ct. 1571, 67 L. Ed. 2d 750 (1981) (declining to recognize implied or common-law contribution right in Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964); *see also Aviall Servs.*, 312 F.3d at 683 (citing *Texas Industries* and *Northwest Airlines* and noting that they "had cast doubt on the ability of federal courts to fashion implied rights of contribution under federal statutes"). In addressing the possibility that Aviall would opt "to frame its § 107 claim on remand as an implied right of contribution (as opposed to a right of cost recovery)," the Court explicitly declined to decide "whether any judicially implied right of contribution survived the passage of SARA." *Cooper Indus.*, 543 U.S. at 170-71. Its observations nevertheless suggest disapproval of such an argument. It noted that it had "visited the subject of implied rights of contribution before," and it cited *Texas Industries*, in which it had declined to recognize an implied or common-law contribution right. *Id.* at 171. And the Court "also note[d] that, in enacting § 113(f)(1), Congress explicitly recognized a particular set (claims 'during or following' the specified civil actions) of the contribution rights previously implied by courts from provisions of CERCLA and the common law." *Id.* (citing *Transamerica Mortgage Advisors,*

Inc. v. Lewis, 444 U.S. 11, 19, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979)).

These observations are consistent with settled principles that the Supreme Court has applied in choosing whether to recognize implied remedies generally and in CERCLA in particular. Concerning implying remedies under federal common law, the Supreme Court has stated that "contribution does not implicate 'uniquely federal interests' of the kind that oblige courts to formulate federal common law." *Texas Indus.*, 451 U.S. at 642. Moreover, it is a "'frequently stated principle of statutory construction . . . that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.'" *Nw. Airlines*, 451 U.S. at 94 n.30 (quoting *Nat'l R.R. Passenger Corp v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458, 94 S. Ct. 690, 38 L. Ed. 2d 646 (1974)). "In the absence of strong indicia of contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Middlesex County Sewerage Auth. v. Nat'l Sea Claims Ass'n*, 453 U.S. 1, 15, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981). It is an "elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage*, 444 U.S. at 19. "[W]here Congress has provided 'elaborate enforcement provisions' for remedying the violation of a federal statute, as Congress has done with . . . CERCLA, 'it cannot be assumed that Congress intended to authorize by implication additional judicial remedies. . . .'" *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 487-88, 116 S. Ct. 1251, 134 L. Ed. 2d 121 (1996) (quoting *Middlesex County*, 453 U.S. at 14).

Section 113(f)(1) provides a PRP the express right to seek contribution from another PRP; § 107(a) does not. Considering the Supreme Court's cautionary statements in *Cooper Industries* and other decisions that reject the adoption of

implied remedies—particularly where, as here, the statute expressly confers a right of contribution—the court holds there is no implied right of contribution under § 107(a) or federal common law.

Moreover, in *Cooper Industries* the Court addressed the proper interpretation of § 113(f)(1). It reasoned that

> if § 113(f)(1) were read to authorize contribution actions at any time, regardless of the existence of a § 106 or § 107(a) civil action, then Congress need not have included the explicit "during or following" condition. In other words, Aviall's reading would render part of the statute entirely superfluous, something we are loath to do. Likewise, if § 113(f)(1) authorizes contribution actions at any time, § 113(f)(3)(B), which permits contribution actions after settlement, is equally superfluous. There is no reason why Congress would bother to specify conditions under which a person may bring a contribution claim, and at the same time allow contribution actions absent those conditions.

Cooper Indus., 543 U.S. at 166 (citation omitted). Applying this rationale to the proper interpretation of § 107(a), if the explicit "during or following" condition of § 113(f)(1) would be rendered superfluous by reading § 113(f)(1) to authorize a contribution action at any time, it would be even more so if § 107(a) were construed to authorize a contribution action at all, since it likewise contains no "during or following" limitation. As the Court explained in *Cooper Industries*, there is no reason why Congress would specify such a condition yet also allow a contribution action absent the condition. Moreover, for all the reasons explained supra at § III(B), § 113(f)(1) and (3)(B) would in their entirety be rendered superfluous, insignificant, or, in some instances, devoid of operative effect if § 107(a) were construed to confer an implied right of contribution under CERCLA or federal common law.

Accordingly, the court holds that a private PRP who seeks to recover from another PRP under CERCLA is limited to bringing a contribution action under § 113(f). Section 107(a) and federal common law do not confer this right.

* * *

The court grants Cooper's November 14, 2005 motion for partial summary judgment on federal claims and dismisses with prejudice Aviall's *CERCLA* § 107(a) cost recovery and § 107(a) and federal common law contribution claims—i.e., the first, second, and third claims of its third complaint. As in Aviall Services, 2000 WL 31730, at *5, having dismissed Aviall's federal question claims on the merits,[15] the court declines to exercise supplemental jurisdiction over its remaining state-law claims and dismisses them without prejudice.[16]

SO ORDERED.

August 8, 2006.

SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

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[15] Although Aviall seeks relief under the federal Declaratory Judgment Act, it is not an independent source of jurisdiction. *See Aviall Services*, 2000 WL 31730, at *5.

[16] The court also dismisses without prejudice Cooper's counterclaims.

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SUPREME COURT, U.S.
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No. 06-562

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER,

v.

ATLANTIC RESEARCH CORPORATION, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR *AMICI CURIAE* E. I. DU PONT DE NEMOURS AND COMPANY, *ET AL.*, IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

Amici E.I. du Pont de Nemours and Company and its wholly owned subsidiary Sporting Goods Properties, Inc. ("DuPont") respectfully submit this brief. DuPont is among the largest chemical products manufacturers in the country and has been and continues to be involved in hundreds of environmental cleanups. In particular, it has engaged in dozens of cleanups without the compulsion of a Section 106 or 107 action or a settlement. DuPont has voluntarily undertaken such cleanups in the expectation under two decades of settled law that it would be entitled to recover an equitable share of the costs of cleanup from other responsible parties including the United States.

Both *amici* are plaintiffs below, and petitioners in this Court, in *E. I. du Pont de Nemours and Company v. United States*, *petition for cert. pending*, No. 06-726. This Court is holding that petition pending decision in the instant case, and therefore DuPont's rights in that case will be governed by the outcome here.[1]

SUMMARY OF ARGUMENT

The question here is whether, following *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), a potentially responsible party ("PRP") under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§ 9601-9675 (1980)) ("CERCLA") that voluntarily undertakes a cleanup and incurs costs without the compulsion of a Section 106 or 107 civil action, and therefore cannot sue for contribution under Section 113(f)(1) as construed in *Cooper*, has *no* cause of action to recover an equitable share of cleanup costs from other PRPs and thus must bear the *entire* cost of the

1. The parties' written consents to the filing of this brief are being submitted to the Clerk of this Court. Pursuant to S.Ct. R. 37.6, *amici* state that this brief was not authored, in whole or in part, by counsel for a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than *amici* or their counsel.

cleanup. The case law prior to the Superfund Amendments and Reauthorization Act of 1986 (Pub. L. No. 99-499, 100 Stat. 1613) ("SARA") enacting Section 113(f)(1) recognized that existing Section 107(a)(4)(B) provided such a cause of action. The government's present position therefore attributes to Congress in 1986 the intent *sub silentio* to cut back on contribution rights by eliminating that recognized claim. That turns upside down the congressional intent in passing SARA.

Furthermore, the government's position is inconsistent with the text, purpose, and background of CERCLA. The plain language of the liability provision in Section 107(a)(4)(B) and of the savings clause in Section 113(f)(1) demonstrates the existence of this right of action. Moreover, this construction is necessary to effectuate the fundamental objectives of CERCLA.

ARGUMENT

SECTION 107(a)(4)(B) PROVIDES A CAUSE OF ACTION FOR A PRP, WHICH UNDERTAKES A CLEANUP WITHOUT THE COMPULSION OF A SECTION 106 OR 107 CIVIL ACTION, TO RECOVER AN EQUITABLE SHARE OF ITS CLEANUP COSTS FROM OTHER PRPS.

I. THE STATUTORY TEXT OF CERCLA ESTABLISHES A SECTION 107(a)(4)(B) CAUSE OF ACTION.

A. The Plain Language Of Section 107(a)(4)(B) Provides A Cause Of Action.

Cooper holds, in line with general principles of statutory construction, that CERCLA must be construed in accordance with its "natural meaning." 543 U.S. at 166. The plain statutory text establishes that a PRP can recover an equitable share of its cleanup costs from other PRPs pursuant to Section 107(a)(4)(B). Indeed, in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), all members of the Court agreed that a PRP could sue another PRP under Section 107(a)(4)(B) to recover cleanup costs. *See Cooper*, 543 U.S. at 172 (Ginsburg, J., dissenting).

In fact, EPA's National Contingency Plan ("NCP") itself recognizes that Section 107 authorizes "any person [to] receive his or her response costs" from PRPs. 40 C.F.R. § 300.700(b)(1) & (c)(2).

Section 107 states that any person in the four enumerated categories of PRPs "shall be liable for . . . any other necessary costs of response incurred by *any other person* consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B) (emphasis added). The language of Section 107(a)(4)(B) is expansive, referring without limitation to "any other person." Accordingly, under Section 107(a)(4)(B), a PRP is liable to "any other person," including another PRP, for an equitable share of cleanup costs. *See Key Tronic*, 511 U.S. at 818 (Section 107 "unquestionably provides a cause of action for private parties to seek recovery of cleanup costs" and "authorizes private parties to recover cleanup costs from other PRP's"); *id.* at 821-22 & n.* (Scalia, J., dissenting) (under Section 107(a), "a party who has incurred costs to clean up a hazardous waste site can recover those costs from any other party liable under CERCLA"); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21-22 (1989) (plurality opinion) (CERCLA allows "private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from the other potentially responsible parties"), *overruled on other grounds*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Cooper*, 543 U.S. at 172 (Ginsburg, J., dissenting); *Metropolitan Water Reclamation District v. North American Galvanizing & Coatings Inc.*, 473 F.3d 824, 830-36 (7th Cir. 2007) ("*MWRD*"); *Atlantic Research Corp. v. United States*, 459 F.3d 827, 834-35 (8th Cir. 2006), *cert. granted*, No. 06-562 (Jan. 19, 2007); *Schaefer v. Town of Victor*, 457 F.3d 188, 200 (2d Cir. 2006); *Consolidated Edison Co. of N.Y., Inc. v. UGI Util. Inc.*, 423 F.3d 90, 99-100 (2d Cir. 2005), *petition for cert. pending*, No. 05-1323; *E. I. du Pont de Nemours and Co. v. United States*, 460 F.3d 515, 548-49 (3d Cir. 2006) (Sloviter, J., dissenting), *petition for cert. pending*, No. 06-726.

Focusing on the word "other" in the phrase "any other person" in Section 107(a)(4)(B), the government argues that "other" refers to a person "other" than the PRPs that grammatically are the subject of the sentence, thus excluding PRPs from the cause of action provided by this subsection. In this way, the government seeks to limit Section 107(a)(4)(B) to what it calls "innocent" parties. For several reasons, the government's reading is unsound.

To begin with, the government looks to the phrase "any other person" in isolation. This is inconsistent with settled principles of statutory construction. *See, e.g., Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1990). Rather, as we show below, the statute, properly read as an integrated whole, comfortably includes PRPs within the encompassing "any other person" language of Section 107(a)(4)(B). *See Key Tronic*, 511 U.S. at 818; *id.* at 821 (Scalia, J., dissenting); *MWRD*, 473 F.3d at 835, *Consol. Edison*, 423 F.3d at 99-100; *Atl. Research*, 459 F.3d at 834-35.

In addition, the government simply invents the critical term "innocent party." Section 107 contains no such restrictive language, and the term "innocent party" appears nowhere in the statute, as the government itself recently acknowledged. *See* U.S. *MWRD* Am. Br. 21 ("innocent party" is "not grounded in any of CERCLA's language").[2]

Moreover, the government's crabbed interpretation cannot be reconciled with the text and structure of Section 107. Subsection (A) provides that PRPs "shall be liable for . . . all costs of removal or remedial action incurred by the United States Government or a State or Indian tribe not inconsistent with the

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2. Not only did the government criticize the "innocent party" cases as lacking a statutory foundation, but it also argued that the entire doctrine "is questionable" and has been "undermine[d]" by "Congress' enactment in 2002 of amendments to CERCLA expressly address[ing] defenses for landowners." U.S. *MWRD* Am. Br. 5, 21-22.

national contingency plan." Thus, it authorizes the federal government to sue PRPs to recover the costs it incurred in exercising its CERCLA powers under Sections 104 and 106. Subsection (A) specifies, in order, the recoverable costs ("all costs of removal or remedial action"); the environmental condition that must be satisfied to be entitled to recover (the incurred costs must not be "inconsistent with the national contingency plan"); and the entity that is authorized to recover (*e.g.*, "the United States Government").

Immediately following subsection (A), subsection (B) provides that PRPs "shall be liable for . . . any other necessary costs incurred by any other person consistent with the national contingency plan." Subsection (B) follows the same structure as subsection (A). Where subsection (A) authorizes recovery of "all costs of removal or remedial action," subsection (B) authorizes recovery of "any other necessary costs of response." Likewise, where subsection (A) provides for recovery of costs "not inconsistent with the national contingency plan," subsection (B) provides for recovery of costs "consistent with the national contingency plan." Finally, of direct relevance here, where subsection (A) entitles "the United States Government" to bring suit to recover such costs, subsection (B) entitles "any other person" to sue. Accordingly, "any other person" in subsection (B) refers to any person other than those – the federal government (or states and Indian tribes) – authorized to file a suit to recover costs under the preceding subsection (A). *See Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995) (adjacent subsections of statute "must be read *in pari materia*"); *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 343 n.3 (2005) ("'other'" is "likely to be [a] word[ ] of *differentiation*") (emphasis in original). In this way, "*everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of the cleanup" (*United States v. Bestfoods*, 524 U.S. 51, 56 n.1 (1998)

(emphasis in original)); contrary to the government's effort here, no PRP is left out.[3]

Furthermore, under this analysis, the two uses of the word "other" in subsection (B) are treated in the same way: "other" in "any other necessary costs" distinguishes the costs recoverable under subsection (B) from those recoverable under subsection (A); and "other" in "any other person" distinguishes those who can sue under subsection (B) from those who can sue under subsection (A). The government, by contrast, impermissibly gives the word "other" two different meanings in the same clause: "other" in "other necessary costs" refers back to subsection (A), while "other" in "any other person" refers not to subsection (A) but to an extra-statutory category of "innocent party." *See, e.g., Rockwell Int'l Corp. v. United States*, No. 05-1272, 2007 WL 895257 at *8, ___S.Ct.___ (Mar. 27, 2007); *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71, 126 S. Ct. 1503, 1513 (2006).

A number of cases – in addition to *Consol. Edison*, *MWRD*, and *Atl. Research* – have construed "any other person" in subsection (B) to refer to persons other than the governments or tribes enumerated in subsection (A). Significantly, many of those decisions preceded enactment of SARA. The seminal decision is *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135, 1142 (E.D. Pa. 1982), *cited in Cooper*, 543 U.S. at 161-62, which consistently has been followed.[4]

3. Section 111(a)(1) and (2) follows the same structure by using, as this Court already has recognized, "any other person" to "denote any nongovernmental entity." *Exxon Corp. v. Hunt*, 475 U.S. 355, 360 n.4 (1986).

4. *See Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 936 n.9 (8th Cir. 1995) (R. Arnold, J.); *Wickland Oil Terminals v. ASARCO, Inc.*, 792 F.2d 887, 891 (9th Cir. 1986), *cited in Cooper*, 543 U.S. at 161-62; *City of New York v. Exxon Corp.*, 633 F. Supp. 609, 617 (S.D.N.Y. 1986) (Weinfeld, J.); *Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 915-16 (N.D. Okla. 1987); *Pinole Point Properties, Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 291 (N.D. Cal. 1984).

The government itself previously acknowledged this construction of Section 107(a)(4)(B). In its *amicus* brief in *Cooper*, the United States told this Court that "other" in the phrase "any other person" serves to distinguish Section 107(a)(4)(B) plaintiffs from the governmental or tribal entities that could sue under subsection (A). *See* U.S. *Cooper* Am. Br. 5, 20-21. Likewise, in its brief in *Key Tronic*, the United States recognized that "[t]he relevant provisions of CERCLA authorize petitioner [a private PRP] to recover 'necessary costs of response.'" U.S. *Key Tronic* Br. 12, *citing* 42 U.S.C. § 9607(a)(4)(B). Similarly, in its post-*Cooper* brief in the Third Circuit in *DuPont*, the United States admitted that "Section 107(a)(4)(B)'s reference to 'any other person' is broad enough to render a PRP liable for another PRP's response costs." U.S. *DuPont* Br. 26. *See also* U.S. *MWRD* Am. Br. 10.

The government's "innocent party" theory also fails to support its position. The entire objective of the government's argument is to demonstrate, on the one hand, that the cause of action in Section 107(a)(4)(B) does not extend to PRPs, and, on the other, that the provision is not superfluous because it does apply to "innocent" parties. However, as the government itself recently recognized, "PRPs may qualify under some circumstances as 'innocent landowners.'" U.S. *MWRD* Am. Br. 21. The defining characteristic of an "innocent party" is not that it is not a PRP, but rather that it did not cause the contamination. *See MWRD*, 473 F.3d at 829. Thus, the government's essential analysis simply crumbles.

The government objects that our interpretation of "any other person" renders that use of "other" superfluous because the phrase "any other necessary costs" already precludes governmental and tribal entities from suing under subsection (B).[5] However, in the most elementary grammatical sense, the

5. The government's analytical approach to CERCLA should be regarded with caution. First, contrary to the premise of the government's (Cont'd)

word "other" in "any other person" is not superfluous. Without that term, subsection (B) literally would allow a PRP to sue "any person," including itself. The government recognizes this possible explanation but does nothing to dispel it. *See* U.S. Br. 21 n.10. Furthermore, Section 113(f)(1) reads the same way. *See* 42 U.S.C. § 9613(f)(1).

Second, nothing prevents Congress from enacting interrelated provisions to reinforce each other to accomplish the same statutory end. Indeed, that is common in statutes and other legal documents. Such a structure does not make any of the individual terms superfluous. Here, Congress, in each of the three operative phrases in subsection (B), manifested that this provision creates a non-governmental recovery scheme to parallel and complement the governmental remedy in subsection (A). *See, e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 259-60 (1994) ("[t]he drafters of a complicated piece of legislation . . . may well have inserted . . . language merely to avoid the risk of an inadvertent conflict in the statute").

Third, under the government's analysis, its own interpretation of "other" in "other necessary costs" would be superfluous. If the government is correct that "any other person" limits subsection (B) plaintiffs to "innocent parties," it would,

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(Cont'd)

analysis, the Court has recognized that, "[w]hile it is generally presumed that statutes do not contain surplusage, instances of surplusage are not unknown." *Arlington Cent. School Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2460 n.1 (2006). "[O]ur preference for avoiding surplusage constructions is not absolute," and, even if surplusage results, "[w]e . . . prefer the plain meaning." *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004). Furthermore, the Court has noted that CERCLA "is not a model of legislative draftsmanship" and "is at best inartful and at worst redundant" because it "was prepared and passed in considerable haste". *Exxon Corp. v. Hunt*, 475 U.S. at 363, 368. Accordingly, "[b]ecause of the inartful crafting of CERCLA, . . . reliance solely upon general canons of statutory construction must be more tempered than usual." *Tippins Inc. v. USX Corp.*, 37 F.3d 87, 93 (3d Cir. 1994) (Becker, J.).

by parity of reasoning, render the "other" in "other necessary costs" unnecessary; since an "innocent party" cannot seek to recover under subsection (B) the kinds of costs that the government can recover under subsection (A), the opening phrase simply could have eliminated the word "other" and read solely in terms of "necessary costs."

Finally, the government relies on the legislative history of CERCLA in two respects. First, it stresses that the bill was amended to add the word "other" to the phrase "any other person." *See* U.S. Br. 19. However, our construction of Section 107(a)(4)(B) gives full meaning to that word. Furthermore, as the government itself concedes (*id.*), the legislative history does not reveal the reason for the amendment and certainly is not inconsistent with our reading of the statutory text. *See Martin v. Hadix*, 527 U.S. 343, 357 (1999) ("inference[ ] . . . [based on] an ambiguous act of legislative drafting. . . . is speculative . . . [because i]t rests on [an] assumption [about] the *reason* [for the amendment]") (emphasis in original).

Second, the government notes that an express contribution provision was deleted from the CERCLA bill. *See* U.S. Br. 23. However, the bill was substantially and hurriedly revised in the final days of the legislative session.[6] A number of amendments were made in order to achieve passage, and many of those did not reflect a substantive rejection of the provision but rather a decision to leave the issue to the courts to resolve. For example, an explicit section to establish joint and several liability was omitted for that reason.[7] Nevertheless, the courts consistently

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6. *See Exxon Corp. v. Hunt*, 475 U.S. at 365-66 & n.10, 368-69, 373; *id.* at 379-80 & n.5, 382 (Stevens, J., dissenting).

7. *See* 126 Cong. Rec. 31,965 (1980) (remarks of Rep. Florio) ("Issues of joint and several liability . . . shall be governed by traditional and evolving principles of common law. The terms joint and several have been deleted with the intent that the liability of joint tort feasors be determined under common law"); *id.* at 31,966 (Department of Justice

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have applied that standard, holding that its deletion from the statute does not preclude its adoption.[8]

B. The Savings Clause And The Contribution Right In Section 113(f)(1) Confirm The Section 107(a)(4)(B) Cause Of Action And Demonstrate That The Section 113(f)(1) Right Under *Cooper* Is Not The Exclusive Action For A PRP To Recover Cleanup Costs.

The government argues that Section 113(f) "constitute[s] the *exclusive* remedy for PRPs under CERCLA." U.S. Br. 35 (emphasis in original). This argument cannot be squared with either the explicit savings clause in Section 113(f)(1) and this Court's construction of that clause in *Cooper*, or with the

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letter agreeing that "'issues of liability not resolved by this act . . . shall be governed by traditional and evolving principles of common law. . . . Any reference to [joint and several liability] has been deleted, and the liability of joint tort feasors will be determined under common . . . law'") (citation omitted); *id.* at 30,932 (remarks of Sen. Randolph) ("[W]e have deleted any reference to joint and several liability, relying on common law principles . . . . It is intended that issues of liability not resolved by this act . . . shall be governed by traditional and evolving principles of common law. . . . Any reference to [joint and several liability] has been deleted, and the liability of joint tort feasors will be determined under common law"); *id.* at 30,986 (remarks of Sens. Stafford and Simpson).

8. *See United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983) (approvingly discussed by Congress in SARA amendments, *see* H.R. Rep. No. 99-253(I), at 74 (1985), *as reprinted in* 1986 U.S.C.C.A.N. 2835, 2856; 131 Cong. Rec. 34,632 (1985) (remarks of Rep. Dingell); *id.* at 34,635-36 (remarks of Rep. Eckart); *id.* at 34,646 (remarks of Rep. Glickman)); *United States v. Ward*, No. 83-63-CIV-5, 1984 WL 15710 (E.D.N.C. May 14, 1984) (approvingly discussed by Congress in SARA amendments, *see* S. Rep. No. 99-11, at 44 (1985); H.R. Rep. No. 99-253(I), at 79, 1986 U.S.C.C.A.N. at 2861)); *United States v. Burlington Northern & Santa Fe Ry. Co.*, Nos. 03-17125, 03-17153, 03-17169, 2007 WL 777875 at *4-*5 (9th Cir. Mar. 16, 2007).

legislative-origin and development of the Section 113(f)(1) contribution right.

1. The savings clause provides that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution [where the conditions for a contribution suit under Section 113(f)(1), as interpreted in *Cooper*, are not met]." 42 U.S.C. § 9613(f)(1). On its face, this clause preserves any action for "contribution," thereby directly refuting the government's contra-textual claim that Section 113(f)(1) is exclusive.

The Court in *Cooper* held that the savings clause "*rebuts* any presumption that the express right of contribution . . . [in Section 113(f)(1)] is the *exclusive* cause of action for contribution available to a PRP." 543 U.S. at 166-67 (emphasis added). This directly forecloses the government's contention.

Finally, the government's reading effectively nullifies the savings clause. The government's ultimate position – that the savings clause preserves only contribution rights under state law – cannot be reconciled with the unrestricted terms and broad scope of the savings clause. If Congress had meant that there were only state claims and no federal claims that would be preserved, it presumably would have said so, but Section 113(f)(1) contains not a word about state law. *See, e.g., Landgraf*, 511 U.S. at 259-60. Furthermore, the savings clause as interpreted by the government would be completely unnecessary because CERCLA already includes a general savings clause that preserves state law. 42 U.S.C. § 9652(d). *See Jama*, 543 U.S. at 342-43.

The Third Circuit in *DuPont* adopted a different but no more persuasive interpretation of the savings clause in Section 113(f)(1). The court of appeals read the clause to "merely clarif[y]" that the cause of action provided in Section 113(f)(3) for contribution suits after settlements is not displaced by the separate contribution action in Section 113(f)(1). 460 F.3d at 532-33. However, it is impossible to believe that, even absent

the savings clause, the separate, distinct, and contemporaneously enacted provisions in two subsections of Section 113(f) would have been misread and collapsed in the manner that concerned the Third Circuit. If Congress had meant the savings clause in Section 113(f)(1) to apply only to the cause of action in Section 113(f)(3), it surely would have said that.

In arguing for exclusivity, the government also relies on the pre-*Cooper* cases in which the courts of appeals held that PRPs could sue for an equitable allocation of cleanup costs under Section 113(f)(1) and therefore could not bring such a suit pursuant to Section 107(a)(4)(B). *See* U.S. Br. 6 n.5, 30. The essential predicate for these decisions was the courts' construction of Section 113(f)(1) to permit a PRP to recoup cleanup costs even in the absence of a Section 106 or 107 civil action or a settlement. Given the Section 113(f)(1) action, courts held that a separate and duplicative cause of action did not arise under Section 107(a).

Cooper rejected the premise of those decisions, holding that a PRP in the situation of Atlantic Research or DuPont did not have a cause of action under Section 113(f)(1). Following *Cooper*, the Second, Seventh, and Eighth Circuits have unanimously rejected their pre-*Cooper* "exclusivity" precedents that a PRP cannot recover costs from other PRPs under Section 107(a)(4)(B). *See MWRD*, 473 F.3d at 828, 833-35; *Atl. Research*, 459 F.3d at 833, 834-835; *Consol. Edison*, 423 F.3d at 98-99. Only the divided panel of the Third Circuit has ruled to the contrary. *See DuPont*, *supra*. Because the fundamental legal rationale of the pre-*Cooper* cases is no longer valid, those cases fall of their own weight.

Furthermore, the practical concerns of the courts in those cases no longer pertain. For example, courts declined to allow a PRP to recover 100% of the cleanup costs based on joint-and-several liability under Section 107(a)(4)(B). However, the Section 107(a)(4)(B) action asserted here involves several rather than joint-and-several liability, resulting in an equitable

allocation of the costs among PRPs. *See* pages 27-29, *infra*. Similarly, courts rejected a Section 107 action that would duplicate the Section 113(f) right that was then thought to be available and allow a PRP to elect to proceed under the former rather than the latter, thereby rendering Section 113(f)(1) superfluous. As the Second, Seventh, and Eighth Circuits have held, *Cooper* eliminates any such issue. After *Cooper*, a PRP cannot choose to proceed under one or the other of those provisions; rather, Sections 107(a) and 113(f)(1) "embod[y different] mechanism[s] for cost recovery available to persons in different procedural circumstances." *Consol. Edison*, 423 F.3d at 99; *see also Atl. Research*, 459 F.3d at 835; *MWRD*, 473 F.3d at 833. For a PRP that has been subject to a civil action under Sections 106 or 107, the contribution claim arises under Section 113(f)(1) as *Cooper* held; for a PRP in other circumstances, Section 107(a)(4)(B) provides the cause of action; but in neither event is there duplication or circumvention of the statutory scheme.

2. In support of its position that Section 113(f) is exclusive, the government repeatedly suggests that it would have made no sense for Congress to enact an express right to contribution in Section 113 in the 1986 SARA amendments but to leave the Section 107(a)(4)(B) action as an implied right under the pre-SARA decisions. *See* U.S. Br. 12, 22, 29, 33 n.14. However, Section 107(a)(4)(B) provides an express rather than implied cause of action. In fact, a number of pre-SARA decisions had recognized that subsection (B) confers an express right. *See* page 26 note 20, *infra*.

Moreover, the government fundamentally misunderstands Section 113(f)(1). Rather than a major substantive provision that completely occupies the field of the equitable allocation of cleanup costs between PRPs, Section 113(f)(1) is an important but entirely procedural provision designed to address a specific concern raised by the government about the timing of contribution claims in cases in which the government had filed

suit against a PRP. This narrow focus explains the key timing language "during or following" in Section 113(f)(1) and is reflected in the explicit directive of the savings clause that other rights are not affected by the targeted contribution provision in Section 113(f)(1).

Section 113(f)(1) began in a bill proposed by the administration. *See* Communication from the President to the Speaker of the House of Representatives, H.R. Doc. No. 99-32, at 23, § 202 (Feb. 26, 1985); S. 494, 99th Cong. § 202 (1985). Section 202 of the bill would have added the following new subsection to Section 107 (emphasis added):

> (k)(1) In any civil or administrative action brought under this section [section 107] or section 106, any claims for contribution or indemnification shall be brought *only after* entry of judgment or date of settlement in good faith.

Following this subsection, the bill also would have added subsection 2 (emphasis added):

> (2) *After* judgment in any civil action under section 106 or subsection (a) of this section, any defendant *held liable* in the action may bring *a separate action* for contribution against any other person liable or potentially liable under subsection (a). Such action shall be brought in accordance with section 113 and shall be governed by Federal law. Except as provided in paragraph (4) of the subsection, this subsection *shall not impair any right of indemnity under existing law.*

The accompanying analysis explained that the amendment "would clarify and confirm existing law governing liability of potentially responsible parties" and provide that *'where a civil or administrative action is underway, contribution actions could be brought only after* a judgment is entered or a settlement in good faith is reached." H.R. Doc. No. 99-32 at 73 (emphasis added).

> The amendment would clarify that *if an enforcement action is underway*, claims for contribution or indemnification could *not be brought until a judgment or settlement is reached. This change would allow the government to limit the number of parties in its actions, so that litigation could be conducted in a more efficient and expeditious fashion.*

Id. at 73-74 (emphasis added).

Thus, this proposed amendment focused on government enforcement actions and was designed to expedite that litigation by requiring that the defendant PRP, instead of raising contribution claims and bringing in new parties in that action, bring such claims in a separate lawsuit after the government's case had been resolved. In all other respects, other rights were preserved.

In congressional hearings, administration witnesses reiterated this explanation for the provision. *See Senate Hearing on S. 51 & S. 494 Before the S. Comm. On Env't & Public Works*, 99th Cong. 58 (Feb. 25, 1985) (statement of Ass't Att'y Gen. Habicht) ("contribution actions, following the government's case, may be appropriate," but "defendants . . . impleading others as third party defendants . . . delay the resolution of the government's suit"); *House Hearing on the Reauthorization of Superfund Before the H. Subcomm. On Water Resources of the Comm. On Public Works & Trans.*, 99th Cong. 548-49 (Mar. 28, 1985) (statement of Mr. Habicht) (proposed amendment concerns "the sequence and timing of litigation"); *id.* at 646-47 (statement of Mr. Habicht) (Contribution "should happen elsewhere – not in our case against the principal defendants. Our concern is one of timing. . . . [T]here would be no need for defense counsel to bring third-party defendants into the [enforcement] case").

After objections were raised to the proposed postponement of contribution, the administration clarified that it intended "only

to postpone the hearing of defendants' contribution claims against third-party defendants until after the government suit is over" but not the "filing" of third-party complaints for contribution. *House Hearing* (Mar. 28, 1985) at 663 (response of EPA Administrator Lee M. Thomas). The administration was "amenable" (*id.*) to a clarifying change in the proposed language. Accordingly, Assistant Attorney General Habicht explained that the government "support[ed] the ability of principal defendants to sue third party defendants for contribution or indemnification as soon as the government enforcement action has commenced." *Id.* at 719-20.

In subsequent hearings, the Senate committee returned to the issue of "the timing of joining parties and for seeking contribution." *Senate Hearings on Superfund Improvement Act of 1985 Before S. Comm. On the Judiciary*, 99th Cong. 2 (June 7 and 10, 1985) (statement of Chairman Thurmond). Emphasizing the need "for a logical sequence of litigation," Mr. Habicht stated that the administration "support[ed]" and would propose a "revision" to "make clear that parties can, under rule 14, bring third-party complaints immediately during the action in chief, and only the hearing of those claims would be put off. . . ." *Id.* at 38; *see also id.* at 52-55, 73-74, 77-79, 91-93, 99-101. To "address[] the Committee's procedural concerns" (*id.* at 53), the administration's amendment provided – in language eventually contained in the enacted Section 113(f)(1) – that a defendant could seek contribution "[d]uring or following" a government enforcement action but the claim would not be adjudicated until the enforcement action had been concluded. *Id.* at 65. Likewise, to make clear the narrow scope of this procedural timing provision, the amendment further stated that "nothing in this subsection shall impair any right of indemnity under existing law." *Id.*; *see also id.* at 30, 51-52, 245-46.

This history makes manifest two critical conclusions. First, the contribution provision in the enabling clause in Section

113(f)(1) is narrowly designed to govern the timing of contribution claims in connection with pending actions brought by the government (or, under the plain language of the provision, a private plaintiff). Since, with respect to the Section 107 issue now before the Court, the government by definition has not initiated a proceeding, the enabling clause in Section 113(f)(1) is irrelevant. Second, to reinforce the narrowness of the enabling clause, the savings clause explicitly confirms that all other contribution rights in any other circumstances are not impaired or superseded. Together, these conclusions are the death knell for the government's argument.[9]

3. The savings clause explicitly preserves all other "right[s] of any person to bring an action for contribution in the absence of a civil action [under Sections 106 or 107]" – that is, in situations in which a Section 113(f)(1) contribution claim cannot be brought under *Cooper*. This statutory provision makes clear that Congress did not abrogate the Section 107(a)(4)(B) right that existed before SARA. In fact, even the Third Circuit, in rejecting the Section 107(a)(4)(B) cause of action, conceded that there is nothing in either the statute or the legislative history that so much as hints at such a retrogressive intent. *See DuPont*, 460 F.3d at 538. *See also, e.g., Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1985) (if Congress wants to disapprove prior judicial decisions, it must make its "intent specific").

The pre-SARA case law broadly recognized the right of PRPs to sue each other, and in particular recognized that a PRP that undertook a cleanup could sue other PRPs for an equitable

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9. In a related vein, the government contends that even if Section 107(a)(4)(B) of CERCLA originally provided the asserted cause of action, that did not survive the subsequent enactment of Section 113(f)(1) in the 1986 SARA amendments. However, not only are implied repeals strongly disfavored (*see, e.g., Rodriguez v. United States*, 480 U.S. 522, 524 (1987)), but the language and history of the enabling and savings clauses in Section 113(f)(1) plainly demonstrate that SARA did not revoke such a right under Section 107(a)(4)(B).

allocation of cleanup costs notwithstanding that it had not been sued by the government. *See Cooper*, 543 U.S. at 161-62 (pre-SARA cases held that "a private party that had incurred response costs, but that had done so voluntarily and was not itself subject to suit, had a cause of action for cost recovery against other PRPs"). Even the Third Circuit acknowledged that pre-SARA cases "allowed private parties, including PRPs, to seek contribution for costs incurred in forced or voluntary cleanups." *DuPont*, 460 F.3d at 521. Furthermore, in enacting Section 113(f)(1) in SARA, Congress approved the courts' recognition of such a right of contribution. *See* H.R. Rep. No. 99-253(I), at 79, *as reprinted in* 1986 U.S.C.C.A.N. at 2861.

The government contends that lower courts "had disagreed" on the existence and source of the right of one PRP to sue another to recover cleanup costs. U.S. Br. 27. To be sure, courts variously characterized the right as express (*see* page 26 note 20, *infra*), or implied, or based on federal common law. But in determining what the savings clause preserves, those differences are immaterial.

Moreover, the lower courts were "virtually unanimous" that a PRP had a Section 107(a)(4)(B) cause of action to recover cleanup costs from other PRPs. *Walls v. Waste Res. Corp.*, 761 F.2d 311, 318 (6th Cir. 1985). *See also Key Tronic*, 511 U.S. at 816 ("numerous cases"); *Cooper*, 543 U.S. at 174 (Ginsburg, J., dissenting). The one case cited by the government to establish a "disagree[ment]" – *United States v. Westinghouse Elec. Corp.*, No. IP 83-9-C, 1983 WL 160587 (S.D. Ind. June 29, 1983) – is the *lone* decision to the contrary. *See Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1492 (D. Colo. 1985); *United States v. Ward*, No. 83-63-CIV-5, 1984 WL 15710, at *3, approvingly discussed by Congress in SARA, *see* page 10 note 8, *supra*. And *Westinghouse* in fact addressed a different issue because the Section 107(a)(4)(B) defendant was not a PRP. *Westinghouse*, 1983 WL 160587 at *3. *See Sand Springs Home*, 670 F. Supp. at 916-17.

The government candidly concedes that two decisions precisely on point upheld a Section 107(a)(4)(B) action by a PRP that had not first been sued. *See City of New York v. Exxon Corp.*, 633 F. Supp. at 615-18; *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. at 1140-43, *cited in Cooper*, 543 U.S. at 161-62. It also cites a third such case but unpersuasively attempts to distinguish it on the ground that it was a declaratory-judgment suit. *See Pinole Point Props., Inc.*, 596 F. Supp. at 290-92.

These decisions – with none to the contrary – are sufficient to establish the pre-SARA law here. But in fact there are a number of additional cases.[10] These cases convincingly demonstrate that, prior to SARA, a PRP that undertook a cleanup without the compulsion of a governmental enforcement action had a Section 107(a)(4)(B) right of action against other PRPs for an equitable sharing of costs. *See Cooper*, 543 U.S. at 161 ("[v]arious courts held that § 107(a)(4)(B) . . . authorized . . . a cause of action" for "a private party that had incurred response costs, but had done so voluntarily and was not itself subject to suit, . . . [to sue] for cost recovery against other PRPs").

The pre-SARA case law sheds critical light on the Section 107(a)(4)(B) cause of action. As *Cooper* summarized, there were two lines of cases. The first, described above, arose where the Section 107(a)(4)(B) PRP-plaintiff had not been sued by the government. The other entailed "the separate question whether a private entity that had been sued in a cost recovery action (by the Government or by another PRP) could obtain contribution

10. *See Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1315 (9th Cir. 1986); *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986); *Wickland Oil Terminal v. ASARCO, Inc.*, 792 F.2d at 889, *cited in Cooper*, 543 U.S. at 161-62; *Allied Towing Corp. v. Great Eastern Petroleum Corp.*, 642 F. Supp. 1339, 1348-49 (E.D. Va. 1986); *Bulk Distribution Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1438-41, 1452 (S.D. Fla. 1984); *Homart Dev. Co. v. Bethlehem Steel Corp.*, No. C84-2579 WSS, 1984 U.S. Dist. LEXIS 14962 at * 1 (N.D. Cal. Aug. 1, 1984). *See also Sand Springs Home*, 670 F. Supp. at 914 (decided under pre-SARA law but issued after enactment of SARA).

from other PRPs. . . . A number of District Courts . . . held that . . . such a right arose either impliedly from provisions of the statute, or as a matter of federal common law." *Cooper*, 543 U.S. at 162. In light of both the structure of the statute and the contribution right and savings clause in Section 113(f)(1), it is clear that the savings clause preserves the former cases, and the Section 113(f)(1) contribution cause of action corresponds to, and makes express, the latter. The Court recognized the second proposition in *Cooper*, and it should now recognize the first in this case. Because the Section 107(a)(4)(B) cause of action here falls in the former category of pre-SARA rights, it is preserved by the savings clause and not superseded by Section 113(f)(1).

II. THE FUNDAMENTAL PURPOSES OF CERCLA DEMONSTRATE THE EXISTENCE OF A SECTION 107(a)(4)(B) CAUSE OF ACTION.

For the foregoing reasons, the text of CERCLA is sufficient to conclude that a PRP can sue another PRP to recover cleanup costs under Section 107(a)(4)(B). That conclusion is reinforced by the congressional purposes underlying CERCLA.[11]

1. As this Court and the courts of appeals consistently have recognized, CERCLA has two fundamental purposes: (1) to promote the prompt cleanup of hazardous waste sites, and (2) to ensure that the parties responsible for the pollution bear the cost of the cleanup.[12] These congressional objectives are indisputable.[13]

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11. CERCLA is a remedial statute that should be liberally construed to effectuate its purposes. *See, e.g., Carson Harbor Village Ltd. v. Unocal Corp.*, 270 F.3d 863, 881 (9th Cir. 2001) (*en banc*).

12. *See Bestfoods*, 524 U.S. at 55-56 & n.1; *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996); *MWRD*, 473 F.3d at 836; *Consol. Edison*, 423 F.3d at 94; *Atl. Research*, 459 F.3d at 837; *Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 676 (3d Cir. 2003); *Aviall Services, Inc. v. Cooper Indus.* Inc., 312 F.3d 677, 681-82 (5th Cir. 2002) (*en banc*), *rev'd on other grounds*, *Cooper*, 543 U.S. 157.

13. We submit that Congress also intended to encourage private parties to undertake *voluntary* cleanups. Because the government does dispute that policy, it is discussed separately. *See* pages 21-25, *infra*.

The government's position would impair both policies. First, by precluding contribution, it would "impermissibly discourag[e] voluntary cleanup" and "would create a perverse incentive for PRPs to wait until they are sued before incurring response costs." *Consol. Edison*, 423 F.3d at 100. *See also Atl. Research*, 459 F. 3d at 837; *MWRD*, 473 F.3d at 836.

Second, the government's position violates the "polluter pays" principle. This case well illustrates that problem. Here, although the United States is legally responsible for contamination at the site at issue, Atlantic Research is forced to bear 100% of the cost of the cleanup.

2. The government asserts that CERCLA is designed to promote cleanups that occur pursuant to settlements with EPA but not those that private parties undertake voluntarily.[14] While Congress unquestionably wanted to encourage settlements, that is a far cry from the government's submission that it also sought to discourage or eliminate voluntary cleanups. *See DuPont*, 460 F.3d at 549 (Sloviter, J., dissenting). In fact, the United States previously has recognized in this Court that "voluntary" cleanups are covered by Section 107(a)(4)(B). *See* U.S. *Key Tronic* Br. 40.

Just as the law generally favors settlement over litigation, Congress sought to promote settlements in place of long and complex litigation, thereby facilitating prompt cleanup and

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14. "Voluntary" cleanups refer to those that were not compelled by a Section 106 or 107 civil action or a settlement (the precondition for a Section 113(f)(1) action under *Cooper*). *See, e.g., MWRD*, 473 F.3d at 826; *Schaefer*, 457 F.3d at 200. In *DuPont*, the cleanups were undertaken pursuant to federal and state environmental statutes and were subject to regulatory oversight either by EPA or a counterpart state agency. For example, at the Louisville plant that was the focus of the proceedings in the district court, the cleanup occurred pursuant to a permit issued under the corrective action program of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. §§ 6901- 6992k ("RCRA").

enabling resources to be devoted to environmental cleanups rather than lawsuits.[15] That Congress preferred settlements to litigation does not in any way suggest that Congress intended to preclude voluntary cleanups outside of settlements.

In addition, both this Court and other courts have recognized that the statute contemplates and encourages voluntary cleanups.[16] Nothing in the statute looks in the opposite direction.

In fact, there is nothing whatever in the statute or legislative history that excludes voluntary cleanups. While, as the Third Circuit noted (460 F.3d at 536-42), Congress recognized the desirability of settlements, it also repeatedly referred to voluntary cleanups.[17]

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15. *See* 131 Cong. Rec. 28,416 (1986) (debate on Conference Report) (remarks of Sen. Stafford) ("I support fair settlements as an efficient alternative to litigation"); *id.* at 28,433-34 (remarks of Sen. Simpson); 131 Cong. Rec. 29,717 (1986) (debate on Conference Report) (remarks of Rep. Lent) (settlements avoid "[c]ostly, protracted litigation [that] threatens the effectiveness of the Superfund Program and consumes resources better spent on cleanup"); H.R. Rep. No. 99-253(I), at 58-59 (1985), *as reprinted in* 1986 U.S.C.C.A.N. at 2840-41 ("Some have criticized the existing program for spending more on wasteful litigation than on actual cleanups. . . . The settlement procedures now set forth are expected to be a significant inducement for the parties to come forward, to settle, to avoid wasteful litigation, and thus to begin cleanup. . . . [The contribution provisions] should encourage quicker, more equitable settlements, decrease litigation and thus facilitate cleanups").

16. *See Cooper*, 543 U.S. at 162; *Union Gas*, 491 U.S. at 21-22 (plurality opinion); *Fisher Dev. Co. v. Boise Cascade Corp.*, 37 F.3d 104, 112 n.2 (3d Cir. 1994); *Consol. Edison*, 423 F.3d at 100; *Atl. Research*, 459 F.3d at 837; *MWRD*, 473 F.3d at 836.

17. *See DuPont*, 460 F.3d at 548-49 (Sloviter, J., dissenting); H.R. Rep. No. 96-1016(I), at 17 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 6119, 6120 (1980) (emphasis added) (CERCLA "would also establish a Federal cause of action . . . to induce such persons *voluntarily* to

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Indeed, during the hearings that led to the amendment to Section 113(f)(1) to allow contribution claims to be brought "during" as well as "following" an enforcement action (*see* pages 15-16, *supra*), the government itself acknowledged the need for voluntary cleanups by PRPs. Assistant Attorney General Habicht stated the administration's position "to strike a balance" in order "to encourage responsible parties to come forward and do the cleanup work expeditiously themselves, whether they are in agreement with EPA or acting under protest." *House Hearing* (Mar. 28, 1985) at 643. Similarly, EPA Administrator Thomas was asked the following written question:

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pursue appropriate environmental response actions"); S. Rep. No. 96-848, at 31 (1980); 126 Cong. Rec. 26,338 (1980) (remarks of Rep. Florio) (emphasis added) (CERCLA provides "a strong incentive both for prevention of releases and *voluntary* cleanup of releases by responsible parties"); 126 Cong. Rec. 26,787 (1980) (remarks of Rep. Florio) ("EPA is required not to act if the responsible party or parties will take appropriate action to cleanup and contain these sites"); 126 Cong. Rec. 26,761 (1980) (remarks of Rep. Florio) (PRPs will have an "incentive . . . to go forward on a voluntary basis and clean up those sites); 126 Cong. Rec. 30,952 (1980) (remarks of Sen. Culver) (one purpose is "to create an incentive . . . for a responsible party to clean up its own releases"); H.R. Rep. No. 99-253(V), at 58 (1985), *as reprinted in* 1986 U.S.C.C.A.N. at 3181 ("[v]oluntary cleanups are essential to a successful program for cleanup of the Nation's hazardous substance pollution problem"); H.R. Rep. No. 99-253(I), at 80, *as reprinted in* 1986 U.S.C.C.A.N. at 2862 (The bill "should encourage private party settlements and cleanups. . . . Private parties may be more willing to assume the financial responsibility ... if they are assured that they can seek contribution from others"); S. Rep. No. 99-11, at 44 (1985) (same); 131 Cong. Rec. 24,730 (1985) (remarks of Sen. Domenici) (emphasis added) ("The goal of CERCLA is to achieve effective and expedited cleanup of as many uncontrolled hazardous waste facilities as possible. One important component of the realistic strategy must be the encouragement of *voluntary* cleanup actions or funding without having the President rely on the panoply of administrative and judicial tools available").

"What specific steps will the Agency take to encourage responsible parties to come forward and initiate site cleanups? Does the Agency believe such industrial volunteers should be encouraged?" Mr. Thomas responded:

> The Agency recognizes that Fund-financed cleanups, administrative action and litigation will not be sufficient to accomplish CERCLA's goals, and that *voluntary cleanups are essential to a successful program for cleanup* of the nation's hazardous waste sites. The Agency has taken a number of steps to encourage participation by responsible parties in the CERCLA program, and will continue to create a climate that is receptive to private party cleanup proposals.

Id. at 710 (emphasis added).

The government candidly concedes that "[t]he legislative history of SARA does contain references to the desirability of 'voluntary cleanups'" and that "the history of the original CERCLA legislation contains some less qualified [that is, affirmative and unambiguous] statements about the desirability of voluntary cleanups." U.S. Br. 41, 42. This history demonstrates the congressional intent, beginning in the 1980 CERCLA legislation and continuing in the 1986 SARA amendments, to encourage voluntary cleanups and thus belies the government's attempt to link voluntary cleanups inexorably with settlements in the SARA amendments – an attempt it does not even try with respect to the original CERCLA statute.

The government further argues that EPA disfavors voluntary cleanups, but that is simply not the case. EPA has often lauded voluntary cleanup efforts and even expressed concern that *Cooper* might reduce the incentive for voluntary cleanups. *DuPont*, 460 F.3d at 549-50 (Sloviter, J., dissenting). In fact, in 1984 – immediately preceding the drafting and consideration of the 1986 SARA amendments – EPA stated that it was "preferable for private parties to conduct cleanups themselves"

and therefore endeavored to "remove or minimize if possible the impediments to voluntary cleanup." Lee M. Thomas & F. Henry Habicht II, U.S. EPA, Interim CERCLA Settlement Policy at 2, 4 (OSWER Directive No. 9835.0) (1984). *See also* 48 Fed. Reg. 40,658, 40,661 (Sept. 8, 1983) (referring to "[v]oluntary or negotiated cleanup" and stating that EPA does "not intend[ ] to preclude responsible parties from taking voluntary response actions outside of a consent agreement"); 55 Fed. Reg. 8666, 8792-8793 (Mar. 8, 1990) ("EPA believes that it is important to encourage private parties to perform voluntary cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination").

Finally, the government is incorrect that settlements providing for EPA supervision of private parties are necessary to ensure the environmental adequacy of the cleanups. Section 107(a)(4)(B) expressly requires that, to recover, the subsection (B) plaintiff must satisfy the burden of demonstrating that the response costs are "necessary" and "consistent with the [NCP]." 42 U.S.C. § 9607(a)(4)(B). This ensures that, as Congress understood, cleanups will be of CERCLA quality in order for a subsection (B) action to be available. *See* 40 C.F.R. § 300.700 (c)(3)(i); 126 Cong. Rec. 30,933 (1980) (remarks of Sen. Randolph) (the NCP will "provide . . . for selection of the most cost-effective and environmentally sound alternative for remedying the site").[18]

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18. *See Regional Airport Auth. of Louisville v. LFG LLC*, 460 F.3d 697, 703-09 (6th Cir. 2006); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 616 (7th Cir. 1998) (Posner, J.,); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. at 1144 n.16.

III. SECTION 107(a)(4)(B) PROVIDES AN EXPRESS CAUSE OF ACTION IN THE NATURE OF CONTRIBUTION.

Section 107(a)(4)(B) provides an *express* right of action that is in the *nature of contribution.*

A. Section 107(a)(4)(B) Provides An Express Cause Of Action.

1. As discussed above, Section 107(a)(4)(B), by its explicit terms, provides a cause of action.[19] By definition, this is an express cause of action. In *Meghrig*, 516 U.S. at 485, the Court unanimously concluded that CERCLA "*expressly* permits the recovery of any 'necessary costs of response, incurred by any . . . person consistent with the national contingency plan, [42 U.S.C.] § 9607(a)(4)(B)" (omission in Court's opinion; emphasis added). Furthermore, pre-SARA cases recognized that Section 107(a)(4)(B) provides an express cause of action.[20]

We recognize that, prior to *Meghrig*, the Court in *Key Tronic* discussed whether the Section 107(a)(4)(B) action should be viewed as "express" or "implied." Justice Scalia's dissent concluded that a subsection (B) claim reflects "the *express* creation of a right of action. . . . Section 107(a)(4)(B) states that persons are liable for certain costs 'incurred by *any other person*' (emphasis added), thus providing an express cause of action for private parties." 511 U.S. at 822 & n.1 (Scalia, J., dissenting) (emphasis in original). However, Justice Stevens's opinion for the majority reasoned that subsection (B) "impliedly authorizes" the cause of action. *Id.* at 816, 818; *see also id.* at 818 n.11.

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19. The government agrees that, whatever the substance of Section 107(a)(4)(B), it provides an express cause of action.

20. *See, e.g., NL Indus. Inc. v. Kaplan*, 792 F.2d at 898; *Wickland Oil Terminals*, 792 F.2d at 887-890, *cited in Cooper*, 543 U.S. at 161-62; *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. at 1143, *cited in Cooper*, 543 U.S. at 161-62.

For two reasons, *Key Tronic* is not controlling on the issue presented here. Indeed, the Second, Seventh, and Eighth Circuits have held that subsection (B) creates an express cause of action.

First, the *Key Tronic* majority was concerned that Section 107(a)(4)(B), which specifies the defendant who would be liable but not the plaintiff who could sue, was not express because it did not explicitly identify the class of intended plaintiffs. *See* 511 U.S. at 818 n.11. Therefore, because subsection (B) implicitly rather than explicitly identified the category of plaintiffs, the majority stated that the cause of action was implied. However, simply because the scope and meaning of the statute had to be filled in by implication — that is, by a process of interpretation — does not mean that the statute does not expressly create the right of action.

Second, the substantive question in *Key Tronic* was whether CERCLA departed from the "American rule" by providing that the prevailing party could recover its attorneys' fees from the loser. The majority relied on the "implied" nature of the subsection (B) action as one of the factors demonstrating that the statute did not embody the necessary "'explicit congressional authorization.'" 511 U.S. at 814-15 (citations omitted). That analysis has no application here.

B. Section 107(a)(4)(B) Provides A Cause Of Action In The Nature Of Contribution.

Because Section 107(a)(4)(B) entitles a PRP to recover response costs from other PRPs, a subsection (B) claim has generally been termed a cost-recovery action. That denomination, however, does not define the characteristics of the cause of action or indicate its relationship to a contribution action. Indeed, as the government itself acknowledges, "[c]ontribution is merely a form of cost recovery, not a wholly independent type of relief." U.S. Br. 33 n.14. For four reasons, the subsection (B) action is in the nature of contribution.

First, CERCLA on its face recognizes that Section 107(a)(4)(B) embraces contribution claims. In particular, Section 113(h)(1) expressly refers to "[a]n action under section 9607 of this title to recover response costs or damages *or for contribution*." 42 U.S.C. § 9613(h)(1) (emphasis added).

Second, it is well established, as the government recognizes (U.S. Br. 38 n.17), that a cause of action between PRPs for an equitable allocation of cleanup costs is a "'quintessential claim for contribution.'" Thus, the subsection (B) action is intrinsically one for contribution.

Third, pre-SARA decisions construed Section 107(a)(4)(B) to give rise to contribution actions between PRPs. *See* pages 17-20, *supra*. Accordingly, under CERCLA, and as preserved in SARA, the subsection (B) action is in the nature of contribution.

Fourth, even absent these governing considerations, Section 107(a)(4)(B) should be sensibly construed to provide a contribution cause of action. *See Union Gas*, 491 U.S. at 21-22 (plurality opinion) ("proportionate amount"); *Cooper* 543 U.S. at 172-74 (Ginsburg, J., dissenting) (referring to "contribution"). This would be the appropriate approach to statutory construction in any event. *See Johnson v. United States*, 529 U.S. 694, 706 n.9 (2000) ("'nothing is better settled than that statutes should receive a sensible construction'") (*quoting In re Chapman*, 166 U.S. 661, 667 (1897)). But beyond that, Congress explicitly contemplated that courts would have broad authority to implement the statute in light of sound legal principles. *See* pages 9-10 & notes 9, 10, *supra*. Furthermore, Congress intended that, even after enactment of Section 113(f)(1), the courts would continue to determine CERCLA contribution principles. *See, e.g.*, S. Rep. No. 99-11 at 45; H.R. Rep. No. 99-253(I) at 80, *as reprinted in* 1986 U.S.C.C.A.N. at 2861.

Specifically, liability between PRPs under Section 107(a)(4)(B) is several rather than joint and several. All agree that such liability must be several so that an equitable allocation

of cleanup costs can be achieved; it would be senseless to entitle the PRP that undertook the cleanup to gain 100% of its costs and thus have no financial responsibility for the contamination. *See Cooper*, 543 U.S. at 174 (Ginsburg, J., dissenting) (recovery of "proportionate share" of costs). Since subsection (B) does not contain a liability standard, it falls to the courts, just as Congress intended, to construe one based on the structure and purposes of the statute. And the settled standard for cleanups that are quintessentially in the nature of contribution is several liability.[21]

For similar reasons, it is not inconsistent that liability is joint and several under Section 107(a)(4)(A) but several under Section 107(a)(4)(B). In enacting CERCLA, Congress deliberately deleted a provision establishing joint and several liability, leaving it to the courts to adopt the proper standard. *See* pages 9-10, *supra*. Under that authority, courts have held that subsection (A) imposes joint and several liability by allowing the government to sue and to recover all of its costs from any responsible party, this best promotes effective enforcement of CERCLA and best enables the United States to recover its own expenditures to replenish the Superfund. As previously explained, however, subsection (B) authorizes suits by private PRPs and is designed to encourage prompt and voluntary cleanups and to facilitate the equitable allocation of cleanup costs. Given these differences in structure and purpose, subsection (A) and (B) actions should not be subject to an identical standard of liability.

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21. In any event, if Section 107(a)(4)(B) liability is joint and several, the subsection (B) defendant would have a contribution counterclaim against the subsection (B) plaintiff under Section 113(f)(1). *See Consol. Edison*, 423 F.3d at 100 n.9; *Atl. Research*, 459 F.3d at 835.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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April 5, 2007

32 pgs 614

Supreme Court U.S.
FILED
APR 4 - 2007
OFFICE OF THE CLERK

(8)

No. 06-562

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC RESEARCH CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICI CURIAE* OF FORD MOTOR COMPANY AND GENERAL MOTORS CORPORATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether, as two circuits have held following this Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), a party that is potentially responsible (a "PRP") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, and that undertakes a cleanup, has a cause of action under Section 107(a) against another PRP.

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INTEREST OF THE AMICI CURIAE

Amici curiae Ford Motor Company ("Ford") and General Motors Corporation ("General Motors" or "GM"),[1] are two of the nation's largest manufacturers of automobiles. Collectively, Ford and General Motors have engaged in numerous environmental cleanups, both at their own facilities and at other sites, including sites for which they have been identified as potentially responsible parties ("PRPs") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* Ford and General Motors have initiated many of these cleanups without waiting for the compulsion of a civil lawsuit under Section 106 or 107(a) of CERCLA: rather, they have done so voluntarily, pursuant to United States Environmental Protection Agency ("EPA") orders, as required conditions of operational permits under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, or in cooperation with state regulatory authorities.

Like Respondent, Ford and General Motors have performed, and continue to perform, many such environmental cleanups, even though various federal government PRPs (collectively, the "United States"), which are partially or wholly responsible for the contamination (and therefore liable for some or all of the cost of cleanup) at these sites, have not cooperated or participated in the response actions. Despite this lack of assistance on the part

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[1] The parties' written consents to the filing of this brief are being submitted to the Clerk of this Court. Pursuant to S.Ct. R. 37.6, *amici* state that this brief was not authored, in whole or in part, by counsel for a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than *amici* or their counsel.

of the United States, Ford and General Motors have been willing to undertake these cleanups because, prior to the Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), well-established CERCLA law ensured that other PRPs, including the United States, could be pursued to contribute their fair share under CERCLA.

Rather than presenting additional arguments on the legal issues already addressed at length by Respondent and by the other briefs in support of Respondent, *amici curiae* instead will describe the potential ramifications of the Court's decision in this matter on the liability of the federal government. Indeed, both Ford and General Motors are also currently plaintiffs in *Ford Motor Co. v. United States*, No. 04-cv-72018 (E.D. Mich.) and *General Motors Corp. v. United States*, No. 01-cv-2201 (DMC) (D.N.J.), respectively, in which they are prosecuting claims for cost recovery and/or contribution under CERCLA (among other statutes) against the United States. Ford's and General Motors' rights in these two cases, as well as its rights in other cases not involving responsible federal agencies, may be impacted by the outcome here. Further, the curtailment of the right to contribution urged by the United States will create an disincentive to future voluntary remediation, and will unfairly impose the full costs of cleanup on parties only partly responsible for contamination. Moreover, accepting the United States' interpretation of the statute would impermissibly allow the United States to insulate itself from CERCLA liability and from paying its fair share of remediation costs.

For these reasons, Ford and General Motors have a critical interest in the outcome of this case, and their informed views should assist the Court in resolving this important issue of law.

STATEMENT OF THIS CASE

Amici curiae concur with and adopt the statement of the case proffered by Respondent.

SUMMARY OF ARGUMENT

The central question before the Court is whether "any other person" who voluntarily incurs necessary costs of response under CERCLA – including Respondent, Ford and General Motors – is precluded from seeking contribution from other PRPs, including the United States and its departments and agencies. The United States urges the Court to eliminate the phrase "any other person" from Section 107(a) of CERCLA, and to restrict contribution to parties forced to perform cleanups by government-initiated lawsuits, thereby eliminating contribution for anyone who performs cleanups voluntarily or pursuant to other forms of governmental compulsion. Such a curtailment of the contribution right under CERCLA would create an enormous disincentive to future voluntary remediation, and would inequitably saddle parties only partly responsible for contamination with the full costs of cleanup.

Moreover, rewriting Section 107(a) in such a manner would undermine Congress' express waiver of sovereign immunity pursuant to Section 120(a) of CERCLA. Section 120(a) contains a broad waiver of the United States' sovereign immunity, expressly providing that "[e]ach department, agency and instrumentality of the United States" is to be liable "in the same manner and to the same extent . . . as any nongovernmental entity, including liability under [Section 107]." 42 U.S.C. § 9620(a). Moreover, lower courts have unequivocally stated that "when the government engages in activities that would make a private party liable [under CERCLA] if the private party engaged in those types of activities, then the government is also liable." *FMC Corp.*

v. United States Dep't. of Commerce, 29 F.3d 833, 841 (3d Cir. 1994). In *Cooper*, this Court, with the support of the United States, removed one of the procedures that gave effect to the waiver embodied in Section 120 when it barred contribution actions under Section 113(f)(1) in the absence of a "civil action" under Section 106 or Section 107(a). If the Court, at the government's behest, removes Section 107(a) claims from the private sector's arsenal, then it will substantially alter Congress's express waiver of sovereign immunity. The Court, however, is not at liberty to remove Section 120(a) from the statute, and therefore should affirm the decision of the Court of Appeals.

Additionally, the United States is supporting an interpretation of Section 107 that would impermissibly allow the United States to prosecute and administer cleanups at certain contaminated sites in a manner that would, according to the Court of Appeals for the Eighth Circuit, "insulate itself from liability for its own pollution." This result is, in the words of the Court of Appeals, "absurd and unjust," and contrary to the fundamental goals of CERCLA that polluters pay for their equitable share of environmental cleanups. Moreover, nothing in the language of Section 107(a) of CERCLA compels this result.

The United States occupies a unique position: it is both an enforcer of environmental laws and one of the largest PRPs. Much of the government's liability stems from wartime industrial production of military equipment and weapons, including direct control by the United States of thousands of facilities throughout the country. For example, on December 11, 1941, just four days after the attack on Pearl Harbor, the Office of Production Management issued an order ending the manufacture of automobiles for private use; General Motors had ceased the production of auto parts at its Trenton, New Jersey facility by the following day. *See* GM-Eastern Aircraft Publication, *A History of Eastern*

Aircraft Division – General Motors, 1944, at 130. Thus, the position espoused by Petitioner – that PRPs are not permitted to seek contribution from other PRPs under Section 107(a) of CERCLA – not only empowers the government to insulate itself from its fair share of cleanup costs simply by choosing not to enforce CERCLA against federal PRPs, but shifts the costs of war and national defense away from the government and onto the private sector.

The United States argues that there is "no factual basis" to support the Court of Appeals' suggestion that the government could insulate itself from liability. Contrary to the United States' assertion, however, Ford and General Motors have experienced circumstances clearly demonstrating that the government is pursuing every avenue within its power to shield itself from CERCLA liability. Equally untenable is Petitioner's argument that the availability of contribution under Section 113(f)(3)(b) following settlements with states alleviates the "highly improbable" problem posed by the self-insulating behavior of the United States. General Motors and Ford's experiences demonstrate that state administrative settlements under Section 113(f)(2) of CERCLA are often difficult to obtain, particularly for sites not listed on the National Priorities List. Moreover, the United States has challenged the validity of at least one state settlement, taking the position that it does not trigger a cause of action for contribution against it under CERCLA. The United States simply cannot argue, on the one hand, that state settlements will ensure that the federal government pay its equitable share under CERCLA, and, on the other hand, that state settlements are invalid against the United States.

I. PETITIONER'S INTERPRETATION WOULD INSULATE THE NATION'S LARGEST POLLUTER FROM CERCLA LIABILITY

On December 29, 1940, President Franklin D. Roosevelt exhorted the nation to stem the Axis threat in Europe and Asia by becoming "the great arsenal of democracy." *See* Fireside Chat 16 (December 29, 1940), available at http://www.millercenter.virginia.edu/scripps/digitalarchive/speeches/spe_1940_1229_roosevelt. Shortly after the Japanese attack on Pearl Harbor, Congress enacted statutes designed to mobilize the United States government and economy in the interests of national defense, to build and operate plants and facilities for the manufacture of war materiel, and to buy, commandeer or otherwise control the industrial facilities, material, equipment, and supplies that were strategic and critical for the war effort. By virtue of these statutes, and the regulations promulgated and executive orders issued to implement the goals of these statutes, the federal government was provided with the power to control the economy and individual plants, including facilities owned and/or operated by Ford and General Motors, in the interests of national defense. Indeed, after the December 11, 1941 order from the Office of Production Management ending the manufacture of automobiles for private use, Ford and General Motors devoted their resources to the war effort.

The scope of the federal government's involvement in private industry during times of war was massive. It has been reported that the United States government entered into contracts with private industry totaling over $175 billion during World War II alone. *See Economic Concentration and World War II*, American Machinist, Aug. 21, 1950, at 147. By early 1943, the United States, through the Defense Plant Corporation, had invested $14 billion in plants for new industry, building and equipping over 1,000 plants in 43 states. *See 1022 Government-Owned War Plants*, Reader's

Digest, Apr. 9, 1943, at 27. The federal government owned nearly 400 aircraft factories, 70 arms plants and 42 shipyards. *See id.*

Building the "arsenal of democracy" came at a cost to the nation far greater than the billions of dollars spent from its treasury. Environmental concerns were often eased or ignored in the interest of concentrating all resources on the war effort. As the Court of Appeals for the Ninth Circuit noted in *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 299 F.3d 1019, 1023 (9th Cir. 2002), often the federal government "made a policy decision not to divert scarce resources from the war effort to stop the pollution." The Ninth Circuit, quoting from the report of a "government consultant," recognized that war-related industries were causing pollution but "personnel could not be diverted from more pressing objectives to study the complex problems related to waste prevention or treatment - nor could construction materials be secured for such purposes." *Id.* (citation omitted in original).

As a consequence of its military and other activities, the federal government is one of the nation's largest PRPs. As of June 2005, the Department of Defense has identified approximately 6,000 former or current military facilities that require remediation of improperly disposed hazardous wastes and substances. *See* Gen. Accounting Office, *Groundwater Contamination: DOD Uses and Develops a Range of Remediation to Cleanup Military Sites* (No. 05-666, June 2005). At the end of 2002, 158 of the 1,233 sites included on the National Priorities List were either owned by the United States or operated by the United States at the time hazardous substances were released at the site. *See* Gen. Accounting Office, *Superfund Program: Current Status and Future Fiscal Challenges* (GAO-03-850) (2003). The federal government's estimated environmental liabilities arising from these sites exceed $300 billion. *See* Gen.

Accounting Office, *Long-Term Commitments: Improving the Budgetary Focus on Environmental Liabilities* (GAO-03-219) (2003).

Federal courts have confirmed that the federal government may be held liable as a responsible party under CERCLA for its role in wartime manufacturing. In *Cadillac Fairview/California,* the Ninth Circuit ruled that the government was liable under CERCLA as an "owner," "operator" and "arranger" arising from its control of a rubber factory during World War II, and was responsible for the contamination that occurred as a result of wartime production at the facility. *See Cadillac Fairview/California*, 299 F.3d at 1025. In *FMC*, the United States Court of Appeals for the Third Circuit held that the United States exercised such substantial control of a facility during World War II that it was liable as an "operator" under CERCLA. The federal government also owned the equipment that had generated the hazardous waste at issue in that case. The Courts of Appeals have uniformly opined that that placing "a cost of the war on the United States, and thus on society as a whole, [constitutes] a result which is neither untoward nor inconsistent with the policy underlying CERCLA." *Id.* at 846; *see also United States v. Shell Oil Co.*, 294 F.3d 1045, 1060 (9th Cir. 2002) ("the cleanup costs are properly seen as part of the war effort for which the American public as a whole should pay").

II. THE UNITED STATES IS POTENTIALLY RESPONSIBLE FOR CONTAMINATION AT FORD AND GENERAL MOTORS FACILITIES

Ford and General Motors played vital and substantial roles in the nation's war efforts. In fact, General Motors was the nation's largest government contractor during World War II, with contracts totaling $13.8 billion worth of war materiel. *See Economic Concentration and World War II,*

American Machinist, Aug. 21, 1950, at 147. Ford was the third largest government contractor, with $5.2 billion dollars in government contracts. *See id.*

A. The United States Owned and Operated Ford and GM Facilities

At various times before, during, and after World War II and the Korean War, in order to satisfy its military needs, the federal government required Ford and General Motors to cease their regular manufacture of various products and to commence the manufacture of military equipment needed for national defense. For example, between February 1942 and September 1945, General Motors did not manufacture a single passenger car in the United States. *See* Alfred P. Sloan, Jr., *My Years with General Motors* at 376 (1990 ed.). Instead, General Motors transformed the bulk of its operations from automobiles to manufacturing tanks, machine guns, aircraft propellers, and other kinds of military equipment. *See id.* at 377.

In some circumstances, the government required Ford and General Motors to expand existing facilities and construct new facilities for these war-production-related purposes, and Ford and General Motors often used equipment owned by the federal government at these facilities. Between June 1940 and August 1944, General Motors received approximately $810 million in public funding to expand its production capacity; Ford received approximately $355 million in public funding. *See* War Production Board, *War Manufacturing Facilities Authorized Through August, 1944* (Jan. 20, 1945). Most notably, with financing and oversight by the government, Ford built and, beginning in 1942, operated the Willow Run B-24 Bomber Plant on government-owned land in Ypsilanti, Michigan (the "Willow Run Facility"), the largest warplane manufacturing facility ever to be built. *See Ford Motor Co. v. United*

States, 378 F.3d 1314, 1315 (Fed. Cir. 2004). Manufacturing operations at the Willow Run Facility included aluminum anodizing and zinc cyanide plating, and produced a discharge of acid and cyanide chemical waste to a waste treatment plant at the facility and to a sludge lagoon and surrounding areas. *See id.* By June 1945, 8,685 aircraft had been manufactured at the facility using machinery and equipment owned by the United States. After World War II, the United States maintained control over several areas of the facility, and continued to require that war materials be built there. For example, during the Korean War, military aircraft were manufactured by Kaiser-Frazer on behalf of the United States at the Willow Run Facility. General Motors purchased the Willow Run Facility from Kaiser-Frazer in 1953.

B. Ford and General Motors Remediation of War Plants

1. The Willow Run Facility

In 1988, the Michigan Department of Natural Resources and EPA notified Ford, General Motors, and five other entities of their potential liability for the Willow Run Creek Site, including cleanup of chemical waste from Ford's war contract operations. *See Ford*, 378 F.3d at 1315. Although government activities at the Willow Run Facility during World War II clearly contributed to contamination at the Willow Run Creek Superfund Site, the United States was not identified as a PRP by EPA with respect to the site. In fact, the "site," as delineated by EPA, did not include property that had been owned by the federal government. Nevertheless, several "Areas of Concern" at the Willow Run Facility have been contaminated by hazardous substances attributable to wartime manufacturing, such as trichloroethylene ("TCE"), total petroleum hydrocarbons ("TPH") and cyanide.

In 1988, Ford and General Motors entered into an Administrative Order on Consent with EPA to conduct a Remedial Investigation and Feasibility Study of the Willow Run Creek Superfund Site. In March 1995, Ford, General Motors and other PRPs agreed to conduct response activities at the site pursuant to a Consent Judgment and Agreement with the State of Michigan. Based on the EPA's delineation of the Willow Run Creek Superfund Site, the Consent Judgment and Agreement did not include the Willow Run Facility itself. Consequently, General Motors has been saddled with investigating and remediating hazardous substances on the property, much of which are directly attributable to the government's ownership, even though General Motors did not conduct any operations at the facility during World War II or the Korean War.

Ford filed suit against the United States for breach of contract for failure to reimburse Ford for costs of the environmental cleanup at the Willow Run Creek Site as required by its War Contract and Termination Agreements. Although it was ultimately successful in enforcing its contractual right to reimbursement, *see Ford*, 378 F.3d at 1320, Ford spent ten years negotiating and in litigation with the United States, incurring significant transaction and litigation costs, including unrecoverable attorneys' fees.

General Motors, however, had no contractual rights *vis-à-vis* the Willow Run Facility. In May 2001, General Motors brought suit against the United States in the United States District Court for the District of New Jersey for contribution under Section 113(f)(1) of CERCLA arising from the government's ownership and operation of sixteen industrial plants during World War II, the Korean War and the Vietnam Conflict, including the Willow Run Facility. Prior to the Court's decision in *Cooper*, the United States settled its liability with General Motors for fourteen of these plants. After the Court granted certiorari in *Cooper*,

however, the United States moved for a judgment on the pleadings, arguing that General Motors failed to state a valid claim under Section 113(f)(1) of CERCLA because "GM does not allege that its liability at the Willow Run or Grand Blanc facilities is, or has been, the subject of an action pursuant to Sections 106 or 107(a) of CERCLA." United States' Mem. In Support of Its Mot. for Judgment on the Pleadings, General Motors Corporation v. United States, No. 01-cv-2201 (DMC) (D.N.J. May 6, 2004), at 9. The United States argued that the civil action brought against General Motors (and Ford) under Section 107(a) of CERCLA with respect to the Willow Run Creek Superfund Site, and subsequent consent decree, did not qualify as a "civil action" for purposes of conferring standing under Section 113(f)(1) of CERCLA because it addressed "[c]ertain off-site contamination from the Willow Run facility," and did not address the "plant itself and the property on which that plant is located." *Id.* at 8, n.5. The District Court stayed this action pending final resolution of *E. I. du Pont de Nemours and Company v. United States*, which itself is currently pending before the Court.

2. The Ford Rouge Manufacturing Complex

Ford's wartime production at its Rouge Manufacturing Complex in Dearborn, Michigan ("Rouge Facility") is also relevant to the Court's consideration of the question presented herein. Ford entered into one or more contracts with the United States to construct "Eagle Boats," mass-produced submarine-chasers, at the Rouge Facility in 1918. Construction of the manufacturing complex at the Facility began in or about January 1918, and continued until about August 1919. Between 1941 and 1946, the United States entered into and maintained several contracts with Ford for the construction and installation of buildings, machinery, equipment and other facilities at the Rouge Facility

necessary for the production of essential war materials, including aircraft, aircraft engines and parts, B-2 superchargers, jettison fuel tanks, tanks, armor plate, shot, and parts for military trucks and jeeps.[2] Among the facilities owned by the government were an aluminum foundry, a Thylox gas purification plant, and a steel foundry. The activities at these war production plants resulted in the generation and release of hazardous substances at the site.

In April 2000, Ford entered into a Corrective Action Consent Order ("CACO") with the Michigan Department of Environmental Quality ("MDEQ") pursuant to the Michigan Natural Resources Protection Act, CERCLA and RCRA. Under the CACO, Ford agreed to investigate and remediate several Areas of Concern. To recover the federal government's fair share of these costs incurred in remediating the Rouge Facility, Ford filed a complaint captioned *Ford Motor Co. v. United States*, No. 04-cv-72018 (E.D. Mich.) ("*Ford v. United States*"), seeking contribution from the United States under CERCLA among other causes of action.

III. PETITIONER'S INTERPRETATION OF SECTION 107(A) WOULD DEFEAT CONGRESS'S INTENTION TO TREAT THE UNITED STATES THE SAME AS ANY OTHER PRP

Section 120(a)(1) of CERCLA provides that:

> [e]ach department, agency, and instrumentality of the United States (including the executive, legislative, and

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[2] Production of automobiles at the Rouge Facility ceased in or about February 1942, after the United States ordered that civilian automobile construction be halted. Civilian automobile manufacturing did not resume at the Rouge Facility until about July 1945.

> judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

42 U.S.C. § 9620(a)(1). This "'unequivoca[l] express[ion]' of the Federal Government's waiver of its own sovereign immunity," *Pennsylvania v. Union Gas*, 491 U.S 1, 10 (1989) (citation omitted) (alteration in original), makes clear that the United States, as a PRP, is to be treated no differently from any other PRP. *See* H.R. Rep. No. 99-253 (I), at 95 (1985), *reprinted in* 1986 U.S.C.C.A.N. at 2877.

Although the legislative history of CERCLA itself contains no reference to Congress's intent in adopting this section, one of CERCLA's sponsors confirmed the intent the Court discerned in *Union Gas*. At a 1984 hearing on possible amendments to CERCLA, Senator Robert Stafford lectured a Department of Defense witness that

> [w]hen those of us on this committee sat here in 1979 and 1980 drafting the Superfund law, we all agreed that *the Federal Government was to be treated just like any other responsible party*. The obligations of the Federal Government were to be exactly the same as those of a private citizen, no more and no less. We think we made this absolutely clear in some of the law's provisions. ... We included these provisions in the law for several policy reasons. First, based on our experience in other environmental laws, *we believed there was a distinct possibility the Federal Government would seek to treat itself*

> *differently from private citizens.* ... I will conclude by saying that these provisions were discussed during markup by this committee, and I don't recall any dissent. *Despite these explicit provisions, the law has been implemented in a way that, for practical purposes, exempts the Department of Defense and other Federal facilities from the Superfund requirement.* Would you please explain why the committee was possibly wrong in deciding that the Department of Defense should be treated exactly as private parties?

Hearings Before the Committee on Environment and Public Works, United States Senate, May 23, 1984, at 343 (statement of Sen. Stafford) (emphasis added). Congress's primary concern in enacting the waiver of sovereign immunity is no less a concern today, when the United States stands poised to erase Congress's clearly expressed intentions almost entirely.

The United States' interpretation of Section 107(a) is fundamentally inconsistent with the broad waiver of sovereign immunity embodied in CERCLA because it could leave PRPs who undertake cleanups voluntarily or in the absence of governmental coercion (*i.e.*, "any other person") without an effective remedy, when the federal government is wholly or partially responsible for the contamination. While PRPs may have a remedy under Section 113(f)(1) or Section 113(f)(3)(B), these remedies are difficult to secure because they depend on the federal or state governments to take proactive measures (filing a lawsuit against the PRP or entering into an administrative settlement with the PRP) that confer standing to the PRP. *See infra*, Section IV(A). By contrast, a remedy under Section 107(a) provides the PRP with an *automatic* remedy against the United States; a

remedy that is not contingent on the government taking steps that are contrary to its self-interest.

Denying PRPs an automatic remedy under Section 107(a) would, in many instances, as a practical matter, destroy Congress's intent by cutting off the government's liability for contamination it caused at hundreds, if not thousands, of facilities where remediation has been completed or is still ongoing. For example, if the Court reverses the decision of the Court of Appeals, the United States may be excused from liability at the two unresolved General Motors sites covered by its Complaint in *General Motors Corporation v. United States*, as well as additional General Motors sites that are not part of the pending lawsuit.

As detailed *infra*, Petitioner's interpretation of Section 107(a) would create numerous options for strategic maneuvering by the federal government to avoid liability for contamination for which the government itself is responsible. For example, the government could simply choose to avoid any enforcement at such sites, or EPA could issue a Section 106 order to a private PRP, requiring it to undertake a cleanup, but without conferring any right of contribution to the PRP. So long as it avoids a civil action under Section 106 or 107, the United States could rest assured that, unlike other PRPs, it would not have to pay the costs of remediating contamination for which it is responsible.

Interpreting Section 107(a) to limit contribution actions to so-called "innocent parties" permits the United States to effectively render meaningless Congress's broad waiver of sovereign immunity. The various means by which the United States could limit a responsible party's recourse against other polluters would have the pernicious effect of distorting the government's enforcement priorities and allowing the United States to evade liability for its own role in contaminating property. Congress plainly never intended

that result. Thus, for the United States truly to be subject to liability "in the same manner and to the same extent" as private parties, a broad contribution right under Section 107(a) must be available to private parties under CERCLA who have incurred response costs for which the United States is partly liable.

IV. PETITIONER'S INTERPRETATION WOULD ALLOW THE UNITED STATES TO INSULATE ITSELF FROM LIABILITY

The behavior of the United States in the wake of the Court's decision in *Cooper* demonstrates that the United States can and will make every attempt to insulate itself from CERCLA liability for its ownership and operation of facilities – such as the Ford and General Motors facilities described above. While the United States now argues that it cannot, and will not, escape liability, its actions belie its arguments. The EPA has several enforcement options that do not trigger a PRP's right to contribution from other PRPs, and EPA has chosen to utilize those options instead of alternatives that would provide a right to contribution from the United States. Similarly, the United States has argued in actual cases that it *cannot* be subject to contribution under Section 113(f)(3)(B) where the PRP has settled its liability with a state on the basis of its purported immunity to state laws and regulations. Thus, the actions of the United States have shown that the problem imagined by the Court of Appeals below is not a hypothetical, abstract concern, but an actual pattern of practice by the United States that the Court should not ignore.

A. EPA Has Several Enforcement Options that Do Not Trigger Contribution Rights

In *Atlantic Research*, the Court of Appeals correctly noted that, in the absence of a PRP's right to contribution under Section 107(a), the federal government could wield its enforcement powers in a way that cuts off contribution rights of PRPs who incur remediation costs voluntarily, and thus protect itself from liability. The Court of Appeals' concern stems from the fact that the federal government is both one of the nation's largest PRP and the ultimate enforcer of the nation's environmental laws. Moreover, EPA, which serves as the primary CERCLA enforcement agency, has long been prohibited from proceeding under CERCLA against the other federal agencies that are often PRPs. *See* Exec. Order 12,580 § 4(e), 52 Fed. Reg. 2923 (Jan. 23, 1987). In fact, the Department of Justice does not permit EPA to sue other federal agencies or issue cleanup orders to them. *See* EPA Interim CERCLA Settlement Policy (OSWER Directive No. 9835.0) (Dec. 5, 1984) at p. 19 ("Instead of litigation," EPA will enter into a Memorandum of Understanding and inter-agency negotiations to resolve federal PRPs' CERCLA liability). Consequently, the government's liability under CERCLA will almost invariably be limited to contribution actions asserted by other PRPs, whether under Section 107(a), Section 113(f)(1) or Section 113(f)(3)(B).

In the first instance, the United States has the ability to shield itself from liability under Section 113(f)(1). According to *Cooper*, the United States can only be subject to a Section 113(f)(1) contribution claim where there is a prior civil action under Section 106 or 107 against the plaintiff PRP. Thus to avoid liability, the government could simply choose to avoid initiating Section 106 or Section 107 enforcement actions at any sites where the government has contributed to the release of hazardous substances. Without an enforcement action under Sections 106 or 107, a PRP who

voluntarily occurs cleanup costs will have no standing to sue the government under Section 113(f)(1).

Additionally, EPA has made it a policy to move remediation out from under CERCLA authority and into other federal and state programs. *See, e.g.*, Steven Herman, Assistant Administrator, EPA, *Coordination Between RCRA Corrective Action and Closure and CERCLA Site Activities*, (Sept. 24, 1996), at p. 2 ("[I]t has long been EPA's policy to defer facilities that may be eligible for inclusion on the National Priorities List (NPL) [under CERCLA] to the RCRA program. . . ."). Thus, the vast majority of contaminated sites across the nation are now being cleaned up under non-CERCLA authority. However, the United States has argued, and one federal court has held, that RCRA consent orders do not constitute a "civil action" for purposes of conferring Section 113(f)(1) contribution rights. *See BASF Catalysts LLC v. United States*, No. 05-11241, --- F. Supp. 2d ---, 2007 WL 925682, at *4-5 (D. Mass. Mar. 26, 2007).

The United States argues in this case that there is no "factual basis" to support the Court of Appeals' suggestion that "the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action" and pursuing alternative enforcement options such as RCRA and Unilateral Administrative Orders (UAOs") under Section 106 of CERCLA. To support its argument, the United States refers to several pre-*Cooper* actions in which federal PRPs were sued by non-governmental PRPs. In each of those cases, however, the EPA had brought suit against non-governmental PRPs at sites where there was potential federal liability, thereby triggering the PRPs' right to sue federal PRPs. A few hand-picked cases that pre-date *Cooper*, furthermore, are irrelevant because it was well-established prior to *Cooper* that a PRP had a right to contribution against

other PRPs – including the United States – so long as it had incurred necessary costs of response that were in excess of its equitable share of liability.

Not only are pre-*Cooper* cases irrelevant to an examination of the government's motives and behavior in a post-*Cooper* landscape, but there is a "factual basis" to the Court of Appeals' suggestion. It is well-documented that UAOs have become EPA's increasingly favored vehicle for securing private party response actions. In 1994, the Deputy Regional Counsel for EPA, Region II reported that since the early 1990s, the "issuance of unilateral orders became more common," and that "more than 50% of privately-funded remedial work is being secured through unilateral administrative orders." Walter E. Mugdan, *The Use of CERCLA Section 106 Administrative Orders to Secure Remedial Action*, C948 ALI-ABA 113, 118 (Oct. 27, 1994).[3] *See also* EPA, *Progress Towards Implementing Superfund, Fiscal Year 1998*, at p. 33 (noting that EPA's issuance of 88 UAOs in 1998 represented "an increase of over 30 percent from last year's issuance"). However, recent federal court decisions have held that UAOs do not constitute a "civil action" for purposes of Section 113(f)(1) or an "administrative settlement" for purposes of Section 113(f)(3)(B). *See, e.g., Pharmacia Corp. v. Clayton Chemical Acquisition LLC*, 382 F. Supp. 2d 1079, 1091 (S.D. Ill. 2005); *Raytheon Aircraft Co. v. United States*, 435 F. Supp. 2d 1136, 1144 (D. Kan. 2006). Therefore, regardless of its motivation, by its increasing reliance on UAOs (and decreasing use of consent decree settlements), EPA reduces the number of PRPs who can avail themselves

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[3] Deputy Regional Counsel Mugdan noted that this increase could be explained by the fact that "consent decree settlement negotiations with [PRPSs] were allowed to drag on interminably." *Id.* at 117.

of Sections 113(f)(1) and 113(f)(3)(B) – including those PRPs who would look to the United States for contribution.[4]

Finally, whether there is a "factual basis" to the Eighth Circuit's concern is irrelevant. What is relevant is the fact that the government could, if it so chose, use its enforcement options to circumvent liability under CERCLA, and thereby circumvent the intent of Congress that government agencies be subject to CERCLA "in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity..." 42 U.S.C. § 9620(a)(1).[5] Indeed, Congress envisioned a "comprehensive" scheme that would address all contaminated sites. Under the United States' view, however, CERCLA becomes much more limited.

B. Administrative Settlements Do Not Provide a Guaranteed Alternative Avenue for Contribution from Other PRPs

The United States also argues that the availability of contribution under Section 113(f)(3)(B) to those who settle

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[4] Additionally, many companies have observed that EPA is using UAOs to avoid federal liability. *See, e.g.*, Inside EPA Superfund Report, *Industry Says U.S. Using Post-Aviall Cleanup Orders to Evade Liability* (Mar. 13, 2006) (noting that Raytheon Aircraft Co. and the U.S. Chamber of Commerce "are charging that the U.S. government is using the Supreme Court's landmark *Aviall* ruling to eliminate its own Superfund liability by issuing cleanup orders that may prevent cost recovery by private parties under the decision, as part of litigation seeking to recover cleanup costs at a former Army facility.").

[5] Similarly, the failure to "provide evidence that the EPA actually uses its enforcement discretion to avoid subjecting other federal agencies to potential liability in a later contribution suit" before the Third Circuit in *DuPont* misses the point. *See DuPont*, 460 F.3d at 542, n.31. Furthermore, any "evidence" of internal EPA or Department of Justice deliberations would likely be privileged and/or unavailable to PRPs under the Freedom of Information Act, 5 U.S.C. § 552.

their liability with the United States or a state will thwart any self-insulating behavior on behalf of the United States. However, just as EPA has the power to avoid enforcement techniques that would trigger the federal government's liability at former government-owned or operated facilities, EPA and the Department of Justice also have the discretion to refuse to enter into settlements with PRPs where the federal government contributed to contamination at the facility at issue. Thus, the federal government's *de facto* exposure under Section 113(f)(3)(B), with respect to settlements with the United States, cannot be relied upon in all situations. *See, e.g.*, EPA's Interim Guidance CERCLA Settlement Policy (OSWER Directive No. 9835.0) (Dec. 5, 1984) at 17 (to obtain release and covenant not to sue, "[r]esponsible parties must release any related claims against the United States").

Similarly, the government's argument that state settlements will ensure that the United States is held responsible for the environmental degradation it caused ignores the simple fact that state administrative settlements that address CERCLA liability are often difficult to obtain. Although state environmental agencies enter into numerous settlements with private parties, these settlements are generally governed by state environmental statutes and are based on model documents that reference state enabling statutes. Additionally, settlements with a state depend on the willingness of the state to settle with the PRP, and the availability of adequate state resources to negotiate settlements in a timely fashion. Where EPA is the lead agency with respect to a facility, however, a state has little or no incentive to settle with a PRP, particularly where such settlement would require the state agency to devote resources to a facility to which it is not otherwise committing resources. Moreover, states might be reluctant to enter into a settlement out of fear that such settlements could interfere

with EPA's administration of remedial actions at such facilities.[6] The Court need not look beyond Respondent and other *amici* in this case to find examples of PRPs who cleaned up sites without a state settlement addressing all or a portion of their CERCLA liability under Section 113(f)(3)(B). *See, e.g., E. I. du Pont de Nemours and Company v. United States*, 460 F.3d 515, 526 (3d Cir. 2006) (DuPont "voluntarily incurred its cleanup costs without having been sued or settled its liability").

Finally, *amicus* General Motors has direct experience with the difficulty that PRPs face in achieving administrative settlements with state agencies. In April 2005, General Motors approached the New Jersey Department of Environmental Protection ("NJDEP") in hopes of settling its CERCLA liability to the State of New Jersey for its facility in Linden, New Jersey, for which the federal government is a PRP. The General Motors automobile assembly plant in Linden was completely retrofitted with government-owned equipment during World War II to manufacture military aircraft. Two years later, NJDEP has simply not responded to General Motors' request. Consequently, a ruling against Respondent in this case would leave General Motors with no CERCLA contribution rights against the United States and saddle the company with the costs attributable to war production.

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[6] The United States itself has recognized this problem in the context of a RCRA citizens action brought against federal PRPs, where plaintiff sought injunctive relief compelling a cleanup, and where there was an existing state Administrative Consent Order governing portions of the cleanup. The United States argued, under the primary jurisdiction doctrine, that such an order would create "the possibility of conflicting administrative and judicial rulings governing the remediation of the same site." Defs.' Mem. of Points and Authorities in Support of Mot. for Summary Judgment and Dismissal, MAXXAM Group, Inc. v. United States, No. 2:05-cv-1834 (D.N.J. Apr. 3, 2007) at 32.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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April 5, 2007

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No. 06-562

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER
v.
ATLANTIC RESEARCH CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICI CURIAE FORMER ADMINISTRATOR CAROL M. BROWNER, FORMER ASSISTANT ADMINISTRATORS DON R. CLAY, TIMOTHY FIELDS, JR., STEVEN A. HERMAN, MARIANNE LAMONT HORINKO, ELLIOTT P. LAWS, AND DR. J. WINSTON PORTER, AND FORMER GENERAL COUNSELS JONATHAN Z. CANNON AND JEAN C. NELSON OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

Amici Curiae are nine former senior officials of the United States Environmental Protection Agency ("EPA"). They each had substantial responsibility for administering the Superfund program established by the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").[1] Each amicus has a longstanding professional expertise relevant to the question presented in this case and to the ramifications to the Superfund program of how the Court decides that question. Each has a strong personal interest in this Court's resolution of the important legal issue raised in this case, and in the efficient, effective and fair administration of the Superfund program so as to protect public health and the environment throughout the United States.

The *amici* include a former EPA Administrator who had overall responsibility for all EPA programs and devoted substantial attention to the Superfund program; two former General Counsels who had responsibility for counseling the Agency and its leadership on legal issues under CERCLA; and a former Assistant Administrator for Enforcement and Compliance Assurance who had responsibility for enforcing CERCLA, which enforcement was a central element of the Superfund program. The *amici* also consist of the last five persons (other than the present office holder) to have served as the Assistant Administrator for the Office of Solid Waste and Emergency Response ("OSWER")—the office charged with primary responsibility for implementing the Superfund

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[1] The parties' written consents to the filing of this brief are being submitted to the Clerk of this Court. Pursuant to S.Ct. R. 37.6, *amici* state that this brief was not authored, in whole or in part, by counsel for a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than *amici* or their counsel.

program. Collectively, these five *amici* led OSWER for almost twenty years, and through four Administrations.

Amici are concerned that the position advanced by the Solicitor General on behalf of the United States in this case will substantially weaken the Superfund program and will undermine crucial policies which have been lynchpins of the program throughout its existence—encouraging expeditious private party cleanups of contaminated sites; applying CERCLA's "polluter pays" principle equally to federal agencies when they are polluters; reducing the litigation and transaction costs of the Superfund program; and enforcing CERCLA in a fair and equitable manner. *Amici* have devoted large amounts of their time and energy to achieving these goals, and a ruling in favor of Petitioner will undermine that which *amici* have worked so hard to accomplish.

A further description of the backgrounds of the individual *amici* is set forth in an Appendix to this brief.

SUMMARY OF ARGUMENT

In June 1996, EPA issued a guidance document to implement a series of reforms that then Administrator Browner (one of the *amici*) had recently announced. In that guidance document, EPA summarized three goals underlying several of these reforms: "to provide greater fairness, reduce litigation and transaction costs, and promote private party cleanup of Superfund sites." United States Environmental Protection Agency, Interim Guidance on Orphan Share Compensation for Settlers of Remedial Design/ Remedial Action and Non-Time-Critical Removals (June 3, 1996), at 1. None of these three objectives were new. They all had been articulated for years in CERCLA's legislative history, in Administration statements on the statute's

implementation, and in judicial holdings on its interpretation. But the formulation in the 1996 guidance document is useful because each of the three purposes recognized there as integral elements of CERCLA enforcement policy would be substantially undermined if Petitioner's counter-textual interpretation of Section 107(a)(4)(B) of CERCLA were accepted by this Court: private party cleanups would be discouraged and delayed, litigation and transaction costs would increase, and unfairness would result.

The overarching objective of CERCLA is to facilitate the prompt cleanup of contaminated sites around the United States at which there have been releases of hazardous substances, so as to protect human health and the environment. Because the number of sites in need of cleanup far exceeds the number of sites EPA has had the resources to address, private party cleanups undertaken without EPA involvement are critical to our national effort to cleanup hazardous sites.

In enacting CERCLA in 1980, Congress recognized that a statute intended to provide (as its name connotes) for "comprehensive environmental response" could not rely solely on government to effectuate that response. So from day one, CERCLA has encouraged private party cleanups by, among other things, providing for the recovery of response costs not just by federal, state and tribal governments, but, as indicated in Section 107(a)(4)(B), by "any other person." Private parties were encouraged to undertake cleanup through the carrot of being able to recover those costs, in whole or in part, from other parties who are liable under CERCLA.

Petitioner argues that parties who may themselves be liable cannot utilize the cost recovery option of Section 107(a)(4)(B). If this position were adopted, it would

severely undermine CERCLA's objectives by discouraging private parties from undertaking prompt, high-quality cleanups of contaminated sites. It would instead encourage those parties to delay cleanup until the government files suit, so that they do not lose their ability to seek cost sharing from other parties who may be liable for cleanup costs at the same site. This would lead to unnecessary litigation, which would both divert scarce governmental resources from more pressing needs and increase the cost of the Superfund process for parties who have, until now, been willing to undertake cleanups without litigation. And the result would compromise the overall fairness of the CERCLA liability scheme by penalizing those who undertake cleanups voluntarily and rewarding those who do not.

Moreover, the position advanced by Petitioner would mean, in combination with this Court's ruling in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), that recipients of administrative cleanup orders under Section 106 of CERCLA—orders which are key elements of the CERCLA enforcement program—could not comply with those orders and then seek recovery of their costs from other liable parties. In contrast, those order recipients who refused to comply, and who provoked a lawsuit from the government, would have a right to recover from other liable parties. Such a result would create irrational incentives, and would again undermine the Agency's ability to encourage or obtain private party cleanups.

Finally, just as CERCLA recognizes that government cannot be the sole solution to the challenges that CERCLA is intended to address, it also recognizes that private parties are not the sole source of those problems. The government, especially the federal government, has been a major source of the problem, and under CERCLA, it needs to be subject to the "polluter pays" principle just like private parties. But the

position advanced by the United States here will put the federal government when it is a polluter in a far better position than private parties would be in similar circumstances. In other words, the position advanced by the United States would result in allowing some federal agencies that have contributed to contaminated sites to escape liability for their conduct, and in so doing improperly places the interests of those federal agencies ahead of the interests of EPA in enforcing CERCLA fairly and equitably as to all responsible parties, including federal agencies.

ARGUMENT

I. INTERPRETING SECTION 107 CONTRARY TO ITS EXPRESS LANGUAGE TO PRECLUDE CLAIMS BY POTENTIALLY RESPONSIBLE PARTIES WOULD DISCOURAGE AND DELAY THE CLEANUP OF CONTAMINATED SITES

A. The Importance of Encouraging Private Party Cleanups

The leaders of EPA and of its Superfund program have long recognized the importance of promoting prompt and effective cleanup of sites by private parties. After all, cleanup of contaminated sites is why CERCLA exists, and there are far more contaminated sites in the United States than EPA will ever have the resources to address. It has been estimated that there may be over 450,000 contaminated commercial and industrial sites across the United States.[2] In contrast, in fiscal year 2006, EPA was able to conduct or

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[2] EPA, The Facts Speak for Themselves: A Fundamentally Different Superfund Program (Nov. 1996), *available at* http://www.epa.gov/superfund/ whatissf/sf_fact4.pdf.

oversee cleanup construction projects (undertaken by EPA or PRPs) at 414 sites. EPA, Superfund Nat'l Accomplishments Summary Fiscal Year 2006 as of Dec. 2006, *available at* http://www.epa.gov/superfund/action/process/numbers06.htm.

These 414 Sites will generally be those most in need of cleanup. But it is clear that most of the contaminated sites in the United States will not be cleaned up by EPA or under EPA's supervision. Encouraging private party cleanups without EPA involvement is therefore essential to addressing the national inventory of contaminated sites.

Congress emphasized the importance of encouraging private party cleanup in the initial 1980 enactment of CERCLA by clearly providing for recovery of response costs by private parties under Section 107(a)(4)(B). The provision for recovery of private party cleanup costs was recognized by this Court in *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994).

Congress also emphasized the goal of encouraging private party cleanup when debating the 1986 SARA amendments. For example, Representative Lent stated: "I am especially proud of a key groundbreaking structural reform that will encourage responsible parties to come forward and take responsibility for cleaning up the toxic waste sites they helped create." 131 Cong. Rec. H4652 (1985). During Congressional hearings on the SARA amendments, Assistant Attorney General Habicht also articulated the importance of encouraging private party cleanups and encouraging persons to undertake cleanup without an EPA enforcement lawsuit: "As the Government's goals in this enforcement process become clear, we're confident that the reasonable parties around the country, who have already demonstrated a recognition of what the rules

are and what the goals of the Government are, will come forward and will become participants in the cleanup process." Reauthorization of Superfund: Hearings Before the Subcomm. on Water Res. of the H. Comm. on Public Works and Transp., 99th Cong. 549 (1985).

Congress recently reemphasized the goal of encouraging private party cleanup when it passed the Small Business Liability Relief and Brownfields Revitalization Act. *See* Pub. L. No. 107-118, 115 Stat. 2356 (2002). These amendments to CERCLA sought, among other things, to stimulate voluntary cleanup programs at the state and local level by providing grants to facilitate private party cleanup of so called "brownfield" sites, contaminated properties with the potential for productive reuse and development. *Id.* § 211. The Senate committee report accompanying this legislation recognized the significance of voluntary cleanup to the overall contaminated property problem, observing that "[t]he vast majority of contaminated sites across the Nation will not be cleaned up by the Superfund program." S. Rep. No. 107-2, at 15 (2001).

That same Senate committee report referred with approval to existing EPA policy for reaching Memoranda of Agreement ("MOA") with states on voluntary cleanup programs. *Id.* In 1997 guidance on drafting MOA with states, EPA clearly indicated its belief that the availability of contribution under CERCLA was an important component of voluntary cleanup programs. *See* Notice of Availability of Final Draft Guidance for Developing Superfund Memoranda of Agreement (MOA) Language Concerning State Voluntary Cleanup Programs, 62 Fed. Reg. 47,495 (Sept. 9, 1997). That guidance reflected EPA's position that a private party taking action under a state voluntary cleanup program can bring a claim against other liable parties as long as cleanup complied with the National Contingency Plan ("NCP"): "The

MOA should make clear to any private party that recovery of response costs under CERCLA will require that the cleanup action meet the requirements outlined in the National Contingency Plan." *Id.* at 47,499.

As this EPA guidance indicates, a broad right of recovery from other liable parties is essential for encouraging safe and effective private party cleanups. This concept was not new in 1997. The necessity of a broad right of recovery was emphasized when President Reagan transmitted his administration's proposed Superfund amendment bill, a precursor to SARA, to Congress in 1985. In the explanatory material accompanying the bill, it was acknowledged that "[p]rivate parties may be more willing to assume the financial responsibility for cleanup if they are assured that they can seek contribution from other" responsible parties. H.R. Doc. No. 99-32, at 73 (1985).

The encouragement of private party cleanups has been one of the great successes of the Superfund program. When reporting on the status of Superfund in 1998, then Acting Assistant Administrator Timothy Fields, Jr. (one of the *amici*) stated that "responsible parties are performing or funding approximately 75% of Superfund long-term cleanups, saving taxpayers more than $12 billion to date." Hearing Before the Subcomm. on Finance and Hazardous Materials, (Feb. 4, 1998) (statement of Timothy Fields, Jr.), *available at* http://www.epa.gov/superfund/action/congress/test0204.htm. Similarly, then Assistant Administrator Steven A. Herman (another of the *amici*) emphasized that "responsible parties play a vital, and in our view, irreplaceable role in cleaning up the nation's Superfund sites." Hearings Before the Subcomm. on Commerce, Trade and Hazardous Materials of the S. Comm. on Commerce (July 18, 1995) (statement of Steven A. Herman).

B. Affirming the Court of Appeals Decision will Get More Sites Cleaned Up, and Cleaned Up Faster

There are many reasons that a private party would undertake a voluntary cleanup of a contaminated site: the party knows it is liable for some part of the contamination and desires to promptly reduce risks to human health or the environment; the party desires to conduct the cleanup before the situation is exacerbated by contaminant migration or the passage of time; the party desires to avoid liabilities to third parties who may be affected by migrating contamination; or the party wants to take advantage of incentives available for participation in a State voluntary cleanup program. All of these reasons support CERCLA's ultimate goal of achieving prompt cleanup. Yet in all of these situations, the party undertaking cleanup would, in Petitioner's view, have no ability to recover its costs from other liable parties under CERCLA.

The inevitable result of adopting Petitioner's position would be that fewer parties would undertake voluntary cleanups. The party considering such a cleanup may have been only a small contributor to the problems at the site, or may have had only technical liability as the present site owner without having contributed to the contamination at all.[3] Yet despite the fact that there may be other clearly liable and viable parties from whom the cleanup costs could be sought, under Petitioner's view the party actually doing the cleanup has no ability to sue those other parties. The

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[3] Present owners of contaminated sites are often liable for those sites even if their actions did not contribute to the contamination in any way. While there are defenses to liability available for some owners of contaminated property, those defenses are not always viable, even for owners who have done nothing to contribute to the contamination.

entire cost of the cleanup will fall on the party who voluntarily remediates the site, and the other parties can escape responsibility altogether. In such a situation, whatever incentives there may be for a private party to undertake cleanup will have to be weighed against the disincentive of losing any ability to get other liable parties to share in the cleanup costs. And in that balance, the big loser is likely to be prompt cleanups. In a world where "no good deed goes unpunished," there will be fewer good deeds, which translates here to fewer voluntary cleanups. If Petitioner prevails, the net effect will be that there will be more contaminated sites in the United States than if Respondent prevails.

Such a result would also have a devastating effect on the formal voluntary cleanup programs that many states have adopted with encouragement from EPA. EPA has long made it clear that parties participating in such programs should be able to seek recovery of costs from other liable parties under CERCLA. *See* 55 Fed. Reg. 8666, 8792-93 (Mar. 8, 1990) ("EPA believes that it is important to encourage private parties to perform voluntary cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination."). If it turns out that EPA was wrong in holding out the hope of cost recovery for those who do voluntary cleanups, the cleanup programs will be sorely damaged.

Not only is the potential availability of cost sharing an important incentive for private parties to conduct cleanups, it is also a powerful incentive for them to conduct good and thorough cleanups. CERCLA provides that a private party can only recover response costs that are "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B); *see also Morrison Enter. v. McShares, Inc.*,

302 F.3d 1127, 1135-36 (10th Cir. 2002). The NCP is part of CERCLA's implementing regulations, and it contains detailed requirements for how cleanups are to be conducted. *See* 40 C.F.R. part 300. A party that knows it will have to demonstrate compliance with the NCP to recover its costs from other liable parties has a strong incentive to conform to the NCP, which helps ensure that the cleanup is fully protective of human health and the environment. A party that knows it cannot recover its costs under CERCLA will not have the same incentive to comply with the NCP.

In 1988, EPA recognized this incentive and proposed revisions to the NCP that were intended to make it easier for a private party undertaking cleanup to know how to comply with the NCP. EPA stated "that providing a list of requirements to be complied with in order to be consistent with the NCP will enhance the probability of a successful cost recovery action, thus providing an incentive to other persons to undertake response actions." 53 Fed. Reg. 51,394, 51,462 (Dec. 21, 1988). In 1990, EPA amended the NCP, adding a new Subpart H to describe how private parties seeking to undertake cleanups should document their costs so that they could recover them from other liable parties. EPA stated that "it is important to encourage private parties to perform voluntary cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination." 55 Fed. Reg. 8666, 8792-93 (Mar. 8, 1990) .[4]

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[4] The provisions added by EPA to the NCP make abundantly clear that in EPA's view, Section 107(a)(4)(B) **can** be utilized by persons who themselves have CERCLA liability. This can be seen in two ways. First, 40 C.F.R. § 300.700(c) provides:

C. The Solicitor General's Brief is Inconsistent With EPA's Policies and Judgment

The United States' brief disparages the importance of voluntary cleanups not done pursuant to settlements with the

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(1) Responsible parties shall be liable for all response costs incurred by the United States government or a state or an Indian tribe not inconsistent with the NCP.

2) Responsible parties shall be liable for necessary costs of response actions to releases of hazardous substances incurred by any other person consistent with the NCP.

Petitioner argues that the phrase "any other person" in Section 107(a)(4)(B) means any person not listed as liable in that section. But the phrase "any other person" in Section 300.700(c)(2) must mean any person other than the United States, a state or a tribe, because the CERCLA liable parties are not enumerated in the regulation (as they are in the statute). Even more compelling is that Section 300.700(c)(3) provides that:

For the purpose of cost recovery under section 107(a)(4)(B) of CERCLA:

(ii) Any response action carried out in compliance with the terms of an order issued by EPA pursuant to section 106 of CERCLA, or a consent decree entered into pursuant to section 122 of CERCLA, will be considered "consistent with the NCP."

Clearly, a party that receives a Section 106 Order or enters into a consent decree with EPA would be presumed to be liable under Section 107. But the NCP makes clear that such parties can still sue under Section 107(a)(4)(B).

government. It asserts that "there is little evidence that, in enacting CERCLA and SARA, Congress intended to promote unsupervised cleanups *at the expense of* government-supervised cleanups pursuant to settlement." U.S. Brief at 39. The United States' brief further asserts that all a party seeking to do a voluntary cleanup and preserve its right to cost sharing from other parties needs to do is enter into a settlement with EPA. It argues: "Moreover, to the extent that a property owner . . . wishes to recover some of its costs from other PRPs, the property owner need only enter into a settlement with the federal or state government." *Id.* at 43.

These statements are at odds with the practical realities of how CERCLA is administered. Certainly settlements with PRPs are important tools, and preferable to contentious litigation. That is beyond dispute. But the process of negotiating and administering settlements is a complex and costly one. Each settlement that EPA enters into requires assembling and analyzing available data and other information, and determining the nature of the remedial work that should be implemented. And once it enters into such a settlement, EPA has an obligation to make sure that the settlement terms are complied with. All of this requires resources, and, were settlements the only gateway for parties wishing to undertake cleanups to be able to obtain cost recovery from other parties, far more resources than EPA and the Superfund program have. For example, parties considering acquiring contaminated properties have often sought to enter into settlements with EPA, called Prospective Purchaser Agreements. But EPA's guidance for such agreements has limited their availability to cases where "an EPA action at the facility has been taken, is ongoing or is anticipated to be undertaken by the Agency." EPA, Guidance on Settlements with Prospective Purchasers of Contaminated Property (May 24, 1995), *available at*

http://www.epa.gov/swerosps/bf/html-doc/purchase.htm. This requirement was intended to preserve EPA's "limited resources."

And disparaging the value of voluntary cleanups undertaken without a settlement with the government is not justified. As discussed above, the potential availability of a cost recovery remedy and the corresponding requirement to comply with the National Contingency Plan will incentivize the quality and promptness of such cleanups. In other words, the experience and judgment of EPA has been that it is worthwhile and environmentally beneficial to encourage voluntary cleanups done without settlements, and that requiring settlements as a prerequisite to cost recovery in all cases would be a waste of scarce governmental resources. It is unfortunate that the Solicitor General would take a position, in a case in which the United States is a party because it is a PRP, that is at odds with EPA's often repeated judgment on these issues.[5]

D. Petitioner's Position Would Discourage Compliance with Administrative Cleanup Orders

Section 106 of CERCLA allows EPA to issue orders to liable parties to undertake cleanup. This is a powerful tool, and one that EPA uses frequently. EPA guidance encourages the use of such orders so that liable parties and not EPA will undertake cleanup. EPA guidance also encourages the issuance of such orders to a subset of all the liable parties at a site, based on an assertion of joint and

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[5] We note in this regard that the name of EPA's General Counsel does not appear on the Solicitor General's Brief here as it did, for example, on the Solicitor General's brief in *Environmental Defense v. Duke Energy*, No. 05-848 (U.S. Apr. 2, 2007).

several liability, so that enforcement of the order by EPA will be manageable. *See* EPA, Documentation of Reason(s) for Not Issuing CERCLA § 106 UAOs to All Identified PRPs (Aug. 2, 1996), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/reason-cer106-rpt.pdf. What happens, then, if there are 60 liable parties at a site, EPA issues a cleanup order to 30 of those, and only 10 of those agree to comply with the order and in fact undertake the entire cleanup? Can those 10 sue the 20 non-compliers and the 30 non-recipients to require them to share in the costs?

Under the Court's decision in *Cooper Industries*, it is unlikely that the administrative order would be considered a civil action to give rise to a contribution claim under Section 113(f). Thus, the order recipients' ability to recover from the non-compliers or non-recipients will turn on whether they have a claim under Section 107(a)(4)(B). EPA's regulations and guidance have assumed that the compliers would be able to seek cost sharing from other liable parties. But if that is incorrect, and the Section 107 remedy is not available, there will be an incentive to order recipients to not comply with the order until they are sued. Such a party would run the risk of sanctions for its failure to comply, but that threat may be outweighed by the fear of losing any ability to pursue other liable parties. Again, the position advocated by the Solicitor General here would punish PRPs who do the right thing (comply with an order) and reward those who do not (and disobey the order).

II. PETITIONER'S POSITION WOULD ALLOW MANY FEDERAL PRPS TO ESCAPE LIABILITY

Another important objective of CERCLA is to ensure that federal government PRPs are treated the same as private

PRPs, and are responsible for cleaning up the contamination they created. This concept is explicitly set forth in the statute itself. Section 120(a) provides:

> Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

42 U.S.C. § 9620(a)(1).

EPA officials have often emphasized the importance of applying CERCLA consistently to federal PRPs. For example, Administrator Browner emphasized that "Superfund is . . . dedicated to cleaning up our nation's hazardous waste sites, **including those caused by the Federal government,** and protecting public health and the environment for citizens no matter where they live in our country." Hearings Before the H. Subcomm. on Finance and Hazardous Materials (May 12, 1999) (statement of Carol Browner) (emphasis added), *available at* http://www.epa.gov/superfund/action/congress/05-12-99.htm. Similarly, in 2001 Administrator Whitman expressed EPA's continued commitment "to a level playing field between Federal agencies and departments and the private sector. Americans rightfully expect their government to abide by the same environmental laws and standards as private business." Letter from Christine Todd Whitman, EPA, to Sen. Jeffords, Chairman S. Comm on Env't and Pub. Works (Oct. 4, 2001), *available at* http://www.epa.gov/compliance/resources/policies/civil/federal/letterwhitman.pdf

But this goal of consistent treatment has been difficult to obtain, because EPA has not been able to sue other parts of the Executive Branch in court and has rarely been able to even issue administrative orders to federal PRPs. Thus, the ability to bring federal PRPs into the process is often dependent on the ability of other PRPs to sue federal PRPs. In light of *Cooper Industries,* private PRPs have seized upon Section 107(a)(4)(B) as a possible method for forcing federal PRPs into the process. If that method is also foreclosed, the ability to hold federal agency PRPs accountable will be severely diminished, and such PRPs may become a special class with a new *de facto* sovereign immunity of the type Congress had explicitly precluded in Section 120.[6]

III. PETITIONER'S POSITION WOULD RESULT IN INCREASED LITIGATION AND TRANSACTION COSTS

One of the most prevalent criticisms of the Superfund program over the years has been that it is perceived to be "laden with transaction costs, particularly attorneys fees." Hearings Before the Subcomm. on Transp. and Hazardous Materials of the H. Comm. on Energy and Commerce (Feb. 10, 1994) (statement of Elliott P. Laws, Ass't Administrator). Mr. Laws (one of the *amici*) noted that "any change that increases the transaction costs resulting from

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[6] In making this point, we in no way intend to disparage the great efforts that federal agencies have made to clean up properties they have owned and operated or otherwise are responsible for. Amici worked closely and cooperatively while at EPA with many federal agencies to address their CERCLA cleanup obligations. Our point is that were the Court to adopt the position urged by the Solicitor General, it would inject both an unfairness and the perception of unfairness in the respective treatment of federal and private PRPs, and that would adversely effect the overall CERCLA program.

public and private litigation is equally unacceptable." Similarly, then Assistant Administrator Steven Herman noted during testimony before Congress the importance to EPA of "ensuring that [PRP] dollars are spent on the actual cleanup costs and not extensive legal costs." Hearings Before the Subcomm. on Water Resources and Environment of the H. Comm. on Transp. (April 10, 1997) (statement of Steven Herman, Ass't Administrator), *available at* http://www.epa.gov/superfund/action/congress/clrtest.htm.

While some measure of litigation is unavoidable in a program such as that created by CERCLA, which imposes a broad and substantial liability scheme, EPA leaders have long and consistently sought to adopt policies that reduce the amount of litigation required to implement the Superfund program, and with the reduction in litigation, the amount of money being spent on things other than site cleanup. The position advocated by the United States here would run directly contrary to this important objective, in a number of ways.

First, a party contemplating a voluntary cleanup will be incentivized to wait until it has been sued by the government before undertaking that cleanup, so it will be able to seek a cost sharing from other liable parties under Section 113(f). In contrast, if the Court affirms a broad right of recovery under Section 107(a)(4)(B), a right that extends to parties themselves liable, anyone can undertake a voluntary cleanup and still seek cost sharing from other parties.

Second, a party that receives a Section 106 cleanup order would, if the United States prevails here, have an incentive to delay compliance with that order until it is sued, so as to ensure a cost sharing remedy. But a broad Section

107(a)(4)(B) right would encourage prompt compliance with such orders without the need for litigation.

Third, were the Court to adopt the United States' position here, it would result in still more litigation over which types of agreements with the government qualify the settler as a "person who has resolved its liability to the United States or a State for some or all of the costs of such action in an administratively or judicially approved settlement" and therefore entitled to contribution under Section 113(f)(3)(B). Following *Cooper Industries*, there has already been much litigation over this issue, and that litigation will continue if Petitioner prevails here. But if Respondent prevails, and a broad and clear right of recovery under Section 107(a)(4)(B) is established, the Section 113(f)(3)(B) issue will largely be moot, and there will not be the need for case by case adjudications over whether a settlement falls within the scope of Section 113(f)(3)(B).

IV. PROVIDING FOR A BROAD RIGHT OF RECOVERY UNDER SECTION 107(A)(4)(B) WOULD CONTRIBUTE TO THE OVERALL FAIRNESS OF THE SUPERFUND PROGRAM

Recognizing that the strict liability scheme established by CERCLA can impose broad liability on persons who did nothing that was wrong at the time they did it, and that application of principles of joint and several liability has the potential to impose disproportionate liability on certain PRPs, the leaders of the Superfund program at EPA have long and consistently sought to maximize the fairness of the program consistent with the goal of prompt site cleanups.

In Congressional testimony, Assistant Attorney General Habicht elaborated on the centrality of contribution

rights to CERCLA's fairness, stating very simply: "[t]he fairness of a joint and several liability scheme depends upon the clear availability of contribution." Oversight Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary, 99th Cong. 51 (1985).

Similarly, the cases interpreting CERCLA have long recognized the importance of contribution to the fairness of a joint and several liability scheme. For example, in *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484 (D. Colo. 1985), a case that preceded the 1986 Amendments to CERCLA that added Section 113(f), the district court found that there was a right to contribution under CERCLA and such a right was essential to the fairness of the liability scheme created. The court cited Dean Prosser's statement that "contribution is an integral component of joint and several liability." *Id.* at 1490 (quoting Prosser, *Law of Torts* § 50 (4th ed. 1982)). The court in *ASARCO* also cited this Court's recognition of the fairness of allowing contribution among parties who have joint and several liability. *Id.* (citing *Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 86-87 (1981)).

Insuring that Superfund is implemented in fair manner has, as discussed above, remained a priority of EPA's leadership in implementing the statute. For example, in March 1998 Congressional testimony Administrator Browner emphasized how "EPA has addressed concerns about the fairness of Superfund." Hearings Before the H. Subcomm. on Finance and Hazardous Materials (Mar. 5, 1998) (statement of Carol Browner), *available at* http://www.epa.gov/ocir/hearings/testimony/105_1997_1998/030598.htm.

Confirming a broad right of private party cost recovery under Section 107(a)(4)(B) will enhance the overall fairness of the Superfund program. It is fair that parties who perform cleanups without the need for litigation, the type of conduct that should be rewarded and not punished, have the ability to obtain cost sharing from other liable parties who refused or otherwise did not participate in the cleanup. And it is fair that those parties who choose to comply with a Section 106 Order issued by EPA have the ability to obtain cost sharing from those parties who refuse to comply with such orders or those parties who are not named in the order by EPA. Conversely, telling parties who receive Section 106 orders that they must comply, but may not pursue those who do not, would be manifestly unfair.

We do not mean to suggest that the courts can or should rewrite clear statutory language to achieve the programmatic and policy objectives we have discussed. But where the statutory language is best read, as it is here, as providing for a right that achieves those objectives, the courts should hesitate to achieve a result that is at odds with both the statutory language and the goals that the statute was enacted to achieve. *See, e.g.*, *Comm'r v. Engle*, 464 U.S. 206, 217 (1984) ("Our duty then is 'to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.'") (citation omitted); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 118 (1983) ("As in all cases of statutory construction, our task is to interpret the words of the statute in light of the purposes Congress sought to serve.") (citation and quotation marks omitted).

CONCLUSION

For the reasons stated above, and by the other *amici* supporting Respondent, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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April 5, 2007

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APPENDIX

APPENDIX

Description of *Amici* Curiae

Carol M. Browner was appointed by President Clinton to be the Administrator of the United States Environmental Protection Agency and was confirmed by the United States Senate in January, 1993. She served in the position for eight years, longer than any other EPA Administrator. Prior to her appointment to EPA, Ms. Browner served as Secretary of the Environment for the State of Florida.

Jonathan Z. Cannon served as the Acting General Counsel of the United States Environmental Protection Agency from 1995 to 1998 and as the Assistant Administrator for Administration and Resource Management for the Agency from 1993 to 1995. He was appointed to the latter position by President Clinton and confirmed by the United States Senate. Mr. Cannon also served as the Acting Assistant Administrator of the Office of Solid Waste and Emergency Response from March to November 1989 and as the Acting Deputy Administrator of EPA from March to May 1993.

Don R. Clay served as the Assistant Administrator for the Office of Solid Waste and Emergency Response of the United States Environmental Protection Agency from 1989 to 1993. Mr. Clay was appointed to that position by President George H.W. Bush and confirmed by the United States Senate. Prior to that, Mr. Clay served as Deputy Assistant Administrator of the Office of Air and Radiation from 1986 to 1989, as Acting Assistant Administrator for Pesticides and Toxic Substances from

1985-86, and Director of the Office of Toxic Substances from 1981 to 1985.

Timothy Fields, Jr. served as the Assistant Administrator for the Office of Solid Waste and Emergency Response of the United States Environmental Protection Agency from 1999 to 2001. Mr. Fields was appointed to that position by President Clinton and confirmed by the United States Senate. Prior to that, Mr. Fields served as the Acting Assistant Administrator for the Office of Solid Waste and Emergency Response from 1997 to 1999, and the Principal Deputy Assistant Administrator for the Office of Solid Waste and Emergency Response from 1994 to 1997. During his thirty year career at EPA, Mr. Fields also served as Director of the Superfund Revitalization Office; as Deputy Director of the Office of Emergency and Remedial Response; as Director of the Emergency Response Division; and as and Deputy Director of the Hazardous Site Control Division.

Steven A. Herman served as the Assistant Administrator for Enforcement and Compliance Assurance of the United States Environmental Protection Agency from 1993 to 2001. Mr. Herman was appointed to that position by President Clinton and confirmed by the United States Senate.

Marianne Lamont Horinko was named Acting Administrator of the United States Environmental Protection Agency by President George W. Bush on July 10, 2003, and served in this position from July 14, 2003 until November 5, 2003. She also served as Assistant Administrator for the Office of Solid Waste and Emergency Response from October 2001 to June 2004 (except for the time during which she was Acting

Administrator). Ms. Horinko was appointed to that position by President George W. Bush and confirmed by the United States Senate.

Elliott P. Laws served as the Assistant Administrator for the Office of Solid Waste and Emergency Response of the United States Environmental Protection Agency from 1993 to 1997. Mr. Laws was appointed to that position by President Clinton and confirmed by the United States Senate.

Jean C. Nelson served as General Counsel of the United States Environmental Protection Agency from 1993 to 1995. Ms. Nelson was appointed to that position by President Clinton and confirmed by the United States Senate.

Dr. J. Winston Porter served as the Assistant Administrator for Solid Waste and Emergency Response of the United States Environmental Protection Agency from 1985 to 1989. Dr. Porter was appointed to that position by President Reagan and confirmed by the United States Senate.

FILED
MAR 2 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-562

In the Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* HURON VALLEY STEEL CORPORATION IN SUPPORT OF PETITIONER

By Written Consent of Petitioner and Respondent

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March 2, 2007

QUESTION PRESENTED

Whether a party that is potentially responsible for the cost of cleaning up property contaminated by hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601, *et seq.*, but that does not satisfy the requirements for bringing an action for contribution under Section 113(f) of CERCLA, 42 U.S.C. §9613(f), may bring an action against another potentially responsible party under Section 107(a), 42 U.S.C. §9607(a).

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INTEREST OF HURON VALLEY STEEL CORPORATION

Amicus Huron Valley Steel Corporation ("HVSC") is one of several defendants in Solutia, Inc. and Pharmacia Corporation v. Mc Wane, Inc., et. al., No. CV-03-PWG-1345-E, presently pending in the United States District Court for the Northern District of Alabama. In the Solutia case, Plaintiffs, which are presently cleaning up PCB contamination in a Superfund site in Anniston, Alabama, have brought contribution and cost recovery claims under CERCLA against numerous industrial companies that operate, or have operated, facilities in the Anniston area, including HVSC, which engages in recycling of non-ferrous scrap metal at its Anniston facility.

A group of these defendant companies in the Solutia case, including HVSC, has entered into an administrative settlement agreement with the United States Environmental Protection Agency ("EPA"). In that agreement, the settling companies have agreed to do a removal action in a second Superfund site in Anniston, Alabama, removing lead from residential yards. In many instances, the lead contaminated yards also contain PCB contamination. In many of those situations, HVSC and the other settling companies have agreed to remove both lead and PCB from the contaminated yards.

In the administrative settlement agreement, EPA has determined that HVSC and other settling companies have committed to and are doing their fair and equitable share of both lead and PCB cleanup; therefore, EPA has given those parties contribution protection for both lead and PCB matters under CERCLA, 42 U.S.C. §9622.

HVSC and the settling companies have moved for summary judgment in the Solutia case. That motion is now pending before the United States District Court for the Northern District of Alabama on the exact question certified for review in this case[1], whether §107(a) of CERCLA permits a potentially responsible party ("PRP") to recover its costs for cleaning up contaminated property from another PRP. This Court's answer to this question may be determinative of the issues in the Solutia case.

HVSC is concerned that if this Court should find that §107(a) of CERCLA permits a PRP to recover its costs for cleaning up contaminated property from another PRP, that finding would require companies, like HVSC, to incur defense costs in addition to the cleanup costs to which it committed, relying upon the contribution protection provisions of CERCLA.

SUMMARY OF ARGUMENT

It is HVSC's position that a PRP that does not satisfy the requirements for bringing a contribution action under §113(f) of

---

[1] Though the question certified for review qualifies the affected PRP as one who does not satisfy the requirements from bringing an action under §113, such qualification is not necessary. Respondent Atlantic Research Corporation has never denied that it is a potentially responsible party under CERCLA, and has intimated in its response to the United States' initial Petition for Writ of Certiorari that it was eligible to bring an action for contribution against the government under Section 113. The decision of the court below has also noted Atlantic Research is "partly responsible" for cleaning up property contaminated by hazardous substances. These facts make the questions exact in this matter and the Solutia case.

CERCLA cannot bring an action against another PRP under §107 (a). No private right of action for contribution or cost recovery in favor of a PRP exists under §107 of CERCLA. Congress expressly reserved to the federal and state governments the right of cost recovery under §107, even when those governments are liable parties at a Superfund site, but did not extend that right to private parties. A comparison of the language of §§107 and 113 clearly demonstrates that since the enactment of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), §107 of CERCLA, has not provided a means of cost recovery in favor of PRPs. The legislative history of CERCLA, as amended by SARA, makes it clear that Congress created the contribution provisions in §113 of CERCLA as the *exclusive* means for PRPs to obtain contribution. Therefore, this Court should not find such a private right of implied contribution, nor should it judicially create one, in §107 of CERCLA. Finally, HVSC contends that sound considerations of public policy mandate that §§107 and 113 of CERCLA should be strictly construed to effectuate the intent of Congress.

ARGUMENT

I.

THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE STATUTE DEMONSTRATES THAT CONGRESS DID NOT INTEND TO PROVIDE A PRIVATE RIGHT OF CONTRIBUTION UNDER §107.

§107 defines the classes of liable parties and provides that they shall be liable for a broad range of specified costs. §107 is the section under which the federal and state governments and Indian tribes recover response costs for study and remediation

of Superfund sites. It has also been held that an innocent party which volunteers to clean up a Superfund site could recover its costs from liable parties under this section.

The controversy in litigation concerning §107 has centered upon whether it provides to a PRP which incurs response costs an implied right of contribution against other PRPs. Initially, federal courts split on this point. Some courts cited the federal rule that creation of private rights of action by implication is not favored. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 101 S. Ct. 1571, 67 L. Ed. 2d 750 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979). Other courts held that recognition of an implied right of contribution was necessary in order to effectuate Congressional intent that parties liable for contamination should share in the costs of remediation. See *United States v. New Castle County*, 642 F. Supp. 1258 (Del. 1986). This court, in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 162; 125 S. Ct. 577; 160 L. Ed 2d 548; 2004 U.S. Lexis 8271 (2004)("Cooper Industries" or "Aviall"), observed that "That conclusion was debatable in light of two decisions of this Court that refused to recognize implied *** rights to contribution in other federal statutes." (Citations omitted.)

That split of authority continued to exist when Congress adopted SARA in 1986. At that time, Congress moved to clarify the contribution issue. In its report on P.L. 99-499 (the bill which enacted SARA), the lead committee in the House of Representatives, the Committee on Energy and Commerce, noted the following in its statement of "Background and Need for the Legislation":

CONTRIBUTION ACTIONS

> The Bill would give potentially responsible parties the explicit right to sue other liable or potentially liable parties who also may be responsible for the hazardous waste site. If a party has resolved its liability to the US or a state in a judicially-approved, good-faith settlement, the party would not be liable for claims for contribution or indemnity on matters addressed in the settlement. These provisions should encourage quicker, more equitable settlements, decrease litigation and thus facilitate cleanups.

1986 U.S. Code Cong. & Admin. News, p. 2841.

In §113 of CERCLA, SARA provided all of the means and mechanisms for dealing with contribution claims. It specified who could seek contribution, under what circumstances a contribution claim would lie, and when a contribution claim could be pursued, i.e., after a settlement resolving one's liability or after an enforcement action had begun. §113 also provided guidelines for allocation of liability between potentially responsible parties and time limitations; thus, it is a complete cost recovery/contribution provision. It is clear and unambiguous on its face. When a statute provides an express remedy in clear and unambiguous terms, that remedy is the sole one available; courts may not seek to alter or expand the remedy or create alternative remedies. 73 *Am. Jur. 2nd Statutes*, §§173-74, pp. 370-371, citing *Olsen v. State of Nebraska*, 313 U.S. 236, 246; 615 S. Ct. 862; 85 L. Ed. 1305 (1941):

> We are not concerned ***with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which "should be

left where *** it was left by the Constitution—to the states and the Congress." (Citations omitted.)

Further, it is clear that §107 simply does not work as a basis for a PRP's cost recovery claim. Can one reasonably assume that Congress would provide to a private PRP a right of recovery in one section, with all the appropriate mechanisms, and in another section with none of the necessary administrative provisions? The question answers itself. From the language of CERCLA, it is clear that Congress provided a remedy - an exclusive remedy - to a private PRP in §113.

II.

LEGISLATIVE HISTORY SHOWS CONGRESS INTENDED §113 AS THE EXCLUSIVE MEANS FOR A PRIVATE PARTY TO OBTAIN ITS CLEAN UP COSTS.

In enacting SARA, Congress did a number of things which are critically important to the question facing this Court. First, Congress confirmed its intent that a liable party which incurs costs should have a right of contribution against other PRPs. Next, it provided that parties which had settled with the government should be free from claims of contribution. Finally, it ***affirmed*** the right of the U.S. or of a state to obtain cost recovery under §107, even if it was a liable party, but ***did not*** affirm any such right in a private PRP.

It is a general rule of construction that when the legislature amends an act it thereby indicates its intent to change the original act by creating a new right or withdrawing an existing one. 1A *Sutherland Statutory Construction*, 6th Ed., 2002 revision, §22.30, pg. 357-8. That section further notes, "It has been held that it can be presumed that Congress was aware of the prior construction of the terms in question in the original act

and deliberately limited the scope of the new act." Id. pg. 358-365. *See also*, 73 *Am. Jur. 2nd Statutes*, §65, p. 280. Thus, when Congress confirmed and clarified the right of the United States or a state to proceed in cost recovery under §107 of CERCLA, ***even if it was, itself, a liable party*** but failed to provide such authority to a private party PRP, it restricted the right of a private PRP to pursue a §107 action.

In its section-by-section analysis of the report on P.L. 99-499 (the bill which enacted SARA), the House of Representatives, the Committee on Energy and Commerce noted, with respect to §113 (the contribution rights section):

> The section also confirms *a Federal right of contribution or indemnification* for persons alleged or held to be liable under section 106 or 107 of CERCLA and prohibits the assertion of such rights against a party who has entered into a judicially approved settlement with EPA.
>
> It has been held that, when joint and several liability is imposed under section 106 or 107 of the Act, a concomitant right of contribution exists under CERCLA. (Citations omitted). Other courts have recognized that a right to contribution exists without squarely addressing the issue. (Citations omitted). *This section clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties*,***. This section does not affect the right of the United States to maintain a cause of action for cost recovery under Section 107 or injunctive relief under Section 106, *whether or not the US was an owner or operator of a facility or a generator of waste at the site. Where the United States has been required to pay response costs as*

> *a generator or facility owner or operator, the United States may maintain an action to recover such costs from other responsible parties*. (Emphasis added).

Id. at 2861-62.

The Bill then went to the House Committee on the Judiciary, which made certain important revisions in the language of §113. Specifically, it struck the requirement for a "good faith" settlement (assuming that any settlement with EPA would be reached in good faith) and broadened the "judicially approved" language to include an administratively approved settlement. The Judiciary Committee Report notes that it dealt with the availability of contribution in claims under Superfund and that its amendments confirm, as did the Energy and Commerce Committee version, that potentially responsible parties have a right of contribution under CERCLA. *Id.* at 3041. The committee then went on to explain:

> The Judiciary Committee made a technical amendment to new subsection 113(g)(3)(A) of CERCLA (as re-designated by the amendment) *which affirms the ability of the United States or a State to maintain an action for *** cost recovery under section 107 against nonsettlors when a settlement does not provide complete relief.* The right of the United States to proceed under section *** 107 is unaffected by its status as an owner or operator of a facility or a generator of waste at the site. In addition, when the United States has been required to pay response costs as a liable party, the United States may maintain an action to recover costs from other responsible parties.
>
> New subsection 113(g)(3)(B) of CERCLA was added by the Judiciary Committee to expressly provide to settlors

> the right to seek contribution from nonsettlors. *** As reported by the Energy and Commerce Committee, new section 113(g) of CERCLA had not by its terms affirmatively provided an express right of contribution to parties who settle with the government for some or all of the costs of a clean-up. (Emphasis added).

Id. at 3043.

The Judiciary Committee also noted that settlement with a *de minimus* party may be incorporated into either a consent decree or an administrative order [as provided under new subsection 122(g)(4)]. The Report noted, "These settlements will protect the party against the contribution claims of other persons who are liable under the Act, unless a person seeking contribution can show that the settlement was achieved through fraud, misrepresentation, other misconduct, or a mutual mistake of fact [new subsection 122(g)(5)]."

Finally, the Conference Report notes these House amendments to the bill were accepted in the final draft. *Id.* at 3315-16.

Where Congress has specified which parties can maintain cost recovery actions under §107, the courts may not, by implication, extend the express language employed by Congress. To do so would violate the rule that the courts are normally reluctant to create private rights by implication. Further, it would violate the maxim of statutory construction, "expressio unius est exclusio alterius," - mention of one thing in a statute impliedly excludes all other things.

Further, because of Congress' action in providing ***specific*** circumstances in which a PRP may assert a contribution claim and the means of doing so, the courts are not authorized to

permit the assertion of that right in a different manner. Again, the specification of the circumstances under which a contribution action will lie and the means and time of bringing it exclude all other contribution actions.

Thus, it is clear that, since the enactment of SARA in 1986, there has been no private right of action under §107 of CERCLA for contribution that can be asserted by any party except the United States or a state.

III.

WHEN THE EIGHTH CIRCUIT IGNORED THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE STATUTE, IT CREATED A NONSENSICAL, UNWORKABLE REMEDY.

The Eighth Circuit in *Atlantic Research Corp. v. United States*, 459 F. 3d 827, 831 (8th Cir. 2006) noted the major differences between Sections 107 and 113, but the court ignored them. Further, it ignored the plain statutory language of CERCLA in order to construct an equitable remedy to allow PRPs to recover their clean up costs under §107. In doing so, it substituted its judgment on policy matters for that of Congress, invading the Congressional prerogative to set national environmental policy.

Not only did the Eighth Circuit ignore the statute but it maligned the circuits which correctly followed CERCLA and their precedents preventing PRPs from utilizing §107 to recover their clean up costs from other PRPs, characterizing their enforcement of §§107 and 113 as "traffic directing." *Id.* at 832.

What caused the Eighth Circuit to abandon the clear language of the statute? The court simply did not like the result of this Court's decision in *Cooper Industries, supra*. The court made that clear: "Today, we consider whether this (our previous) ruling remains viable in the post-*Aviall* world." *Id.* at 831. Further, the Eighth Circuit said that to follow its previous rulings and in light of this Court's decision in *Cooper Industries* – a ruling based upon the plain, unambiguous language of the statute, would result in "***an absurd and unjust outcome."

However, flying in the face of the statute and its own precedent, the Eighth Circuit seemed to realize the difficulty which its ruling would create; that a liable party would suddenly have a right to recovery under a section of CERCLA which provides for full cost recovery. Still, the court had a curious solution for that problem. The court suggested that, when a liable PRP brings an action for cost recovery under §107, the defendant in that action only needs to counterclaim for contribution under §113:

> ***CERCLA, itself, checks overreaching liable parties: if a plaintiff attempted to use §107 to recover more than its fair share of reimbursement, a defendant would be free to counterclaim for contribution under §113(f). (Citations omitted) ****

Id. at 835.

The Eighth Circuit would thus encourage evermore Superfund litigation, a total, unnecessary waste of judicial resources, and the foreseeable consequence of trying to force a statutory section to be something that it is not.

IV.

TO ALLOW PRPs TO MAINTAIN A COST RECOVERY ACTION UNDER §107 WOULD DETER NEGOTIATED SETTLEMENTS WITH EPA AND EXPEDITIOUS SUPERFUND CLEANUPS.

HVSC defers to the experience of the United States in fully addressing the policy issues involving encouragement of early settlement and expeditious cleanups, but it can bring a unique perspective to this issue – that of a settling PRP.

Courts which attempt to minimize the importance of limiting contribution actions to §113 and thus energizing the contribution protections of §122, simply do not understand the motivation of settling PRPs. One of the best illustrations of this is HVSC's experience in the Anniston Lead Superfund matter. HVSC would not have entered into a settlement agreement with EPA, obligating the settling parties to do tens of millions of dollars worth of cleanup had those settling parties not received full, effective contribution protection. To eviscerate this protection by giving liable PRPs a back door right to contribution under §107 would effectively nullify the Congressionally mandated remedy process, preventing many early settlements from occurring and resulting in the necessity for the Agency to bring enforcement actions, with extensive early contribution litigation clogging the courts, in order to obtain PRP – financed cleanups. Further, in those cases where EPA was able to achieve early cleanup settlement agreements, those agreements would, in many cases, be far less favorable to the United States because settling PRPs would be forced to make much more limited commitments if they could not count on the viability of contribution protection.

CONCLUSION

Based upon the foregoing authority and arguments, this Court is respectfully urged to:

1. Rule that the Court of Appeals for the Eighth Circuit erred in finding a private right of action for a liable PRP under §107 of CERCLA; and

2. Reverse the Eighth Circuit's decision and reinstate the orders of the district courts dismissing the claims in this case.

Respectfully submitted,

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108 pgs

No. 06-562

APR05

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ATLANTIC RESEARCH CORPORATION

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF JAMES KOTROUS AS AMICUS CURIAE SUPPORTING RESPONDENT

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I. STATEMENT OF INTEREST

Amicus Curiae James Kotrous, individually and doing business as The Mattress Factory, (Kotrous)[1] urges this Court to uphold the United States Eighth Circuit Court of Appeals decision, *Atlantic Research Corp. v. United States,* 459 F.3d 827 (8th Cir. 2006) (*Atlantic Research*), in accordance with this Court's opinion in *Key Tronic Corp. v. United States,* 511 U.S. 809 (1994) (*Key Tronic*), that potentially responsible parties are entitled to recover response costs from other potentially responsible parties, in the absence of a Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*, (CERCLA) enforcement action or government settlement, through an implied right of contribution for the fair share of recovery costs under section 107 of CERCLA. Kotrous is a plaintiff in a CERCLA contribution case now pending interlocutory challenge, under seemingly identical allegations to those at issue in this Court, in the United States Ninth Circuit Court of Appeals, *James Kotrous v. Goss-Jewett Company of Northern California, Inc.,* No. 06-15162, consolidated with the already consolidated cases in *Goodrich Corporation v. County of San Bernadino,* Nos. 05-56694 and 05-56749 (hereafter referred to as "*Kotrous v. Goss-Jewett*"), *see* Exhibit A hereto.

As a California property owner enduring necessary litigation in the United States Eastern District Court of

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[1] This brief is submitted with the consent of the parties. Amicus Curiae James Kotrous affirms that this brief was drafted exclusively by his counsel of record and that Amicus Curiae James Kotrous provided all monetary contributions for the preparation of this brief.

California since 2002, Kotrous, an individual who unknowingly purchased contaminated property in October 1995, seeks to inform this Court's decision in this important case. The litigation commenced by Kotrous involves certain property located at 4301 Power Inn Road in Sacramento, California. From 1970 through 1996, the primary defendant in the litigation, Goss-Jewett Company of Northern California (Goss-Jewett), leased the subject property to engage in purchasing, storing onsite, and distributing chemicals (containing perchloreoethylene (PCE)) used in dry cleaning establishments. Goss-Jewett failed to cooperate with the state agency with jurisdiction over contaminated sites in Sacramento, the Central Valley Regional Water Quality Control Board (State). The State issued a cleanup and abatement order against Goss-Jewett and one of its officers responsible for the activities resulting in contamination, but the defendants did not comply.

In searching for responsible parties to come up with funding for the cleanup, the State then issued a new cleanup and abatement order, which also imposed direct cleanup responsibility on Kotrous and a former owner of the contaminated site at issue in the pending action before the Ninth Circuit. Soon after receiving the cleanup and abatement order, Kotrous initiated a CERCLA action to recover costs of the cleanup by way of contribution against other "potentially responsible parties" (PRPs), as authorized by CERCLA section 107(a) and by CERCLA section 113(f). *See* Exhibit B hereto. As similarly noted by the Eighth Circuit in *Atlantic Research*, Kotrous is by definition a "potentially responsible party" due to his mere ownership of the property; the application of this term and the ownership of property, however, does not alone signify that Kotrous is actually responsible for any activity that

resulted in the contamination of the property. *See Atlantic Research,* 459 U.S. at 831; *see also* 42 U.S.C. § 9607(a)(1) (defining any "owner and operator" of a contaminated property as liable for cleanup and response costs under CERCLA).

Since the issuance of this Court's decision in *Cooper Industries, Inc. v. Aviall Serv., Inc.,* 543 U.S. 157 (2004) (*Cooper*), the fate of numerous contaminated sites throughout the country (not the least of which is the property owned by Kotrous that is at issue in the pending Ninth Circuit challenges) has been highly uncertain. Appellants in *Kotrous v. Goss-Jewett* asserted *Cooper* to challenge the District Court's jurisdiction over Kotrous' section 107 and section 113 contribution actions. The District Court upheld Kotrous' standing to raise the CERCLA causes of action by ruling only on the section 107 contribution issue and asserting that CERCLA section 107 maintains an implied right to contribution for PRPs. Appellants successfully sought interlocutory review of the District Court's decision by the Ninth Circuit. Pending resolution at the Ninth Circuit, the District Court proceedings are stayed. Meanwhile, the contamination remains and efforts continue to try to remedy the contamination of Kotrous' property caused by others prior to Kotrous' ownership of the property. *See* Exhibit A hereto.

This Court's decision in the present case will inevitably direct the Ninth Circuit's decision in *Kotrous v. Goss-Jewett.* Appellants in *Kotrous v. Goss-Jewett* seek the Ninth Circuit to wipe out, in one quick sweep, five years of litigation initiated by Kotrous to clean up property contaminated from activities taking place prior to Kotrous'

ownership of the property.[2] Completely denying PRPs, like Kotrous, a right to contribution would inevitably result in similar denials to landowners throughout the country and would devastate progress of voluntary contaminated site cleanups.

Over all things, Kotrous respectfully requests this Court to bring certainty to the currently unsettled state of CERCLA contribution across the nation. Individuals whom currently own properties contaminated, by actions of others, and for one reason or another were not able to or did not avail themselves of "innocent landowner" exemptions when they purchased the property, as is the case with Kotrous, deserve a standard set of game rules. The game rules that parties applied for years were haltingly thrown out in 2004 with this Court's decision in *Cooper,* which unsettled many contribution actions already brought by PRPs under section 113 of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (Superfund Amendments). Since that time, extensive time and resources have been devoted to post-*Cooper* litigation throughout the country as parties and lower courts grapple with the law and equities of completely closing the door to contribution actions of those PRPs who are not subject to a government enforcement action or settlement.

This Court's ruling herein will directly impact the ability and willingness of private parties to initiate a

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[2] The Eastern District Court of California did not rule on the issue of whether Kotrous qualifies to bring a claim for contribution under section 113. Thus, Kotrous has reserved and continues to reserve all rights to subsequently argue in the Eastern District Court of Appeal and/or the Ninth Circuit Court of Appeals that he has met the standing requirements under section 113.

CERCLA action to recover cleanup costs from other PRPs. Moreover, resolution of the issues raised in this case, together with the *Cooper* ruling, will greatly influence whether private parties will continue to voluntarily remediate contaminated sites. Kotrous respectfully urges this Court to unambiguously uphold the right of PRPs to commence CERCLA litigation for contribution of recovery costs from other PRPs, pursuant to CERCLA section 107, so that individuals like Kotrous across the nation can move forward in cleaning up contaminated sites before commencement of government enforcement proceedings.

II. ARGUMENT

A. Public Policy Demands That Owners Of Contaminated Sites Have The Right To Recover Cleanup Costs Under Section 107 Against "Any Other Person"

Stepping away from the semantics of CERCLA section 107 and Superfund amendments section 113(f), Kotrous respectfully urges this Court to carefully consider the major policy ramifications of prohibiting a landowner, such as Kotrous, from proactively initiating CERCLA litigation against parties that were involved in activities resulting in contamination at the site to facilitate remediation of their property. Kotrous purchased property subject to contamination and subsequently sought to undergo the expense and burden of litigation to ensure that all responsible actors would contribute to the cost of cleanup. In Kotrous' case, the State pursued an administrative enforcement action against Kotrous because it could not compel the responsible parties, whom are no longer affiliated with the contaminated site, to comply with its administrative enforcement attempts. The State chose not to take on the

expense and staff drain of litigation and rather pursued administrative efforts with the current owners and lessees on the property. Kotrous filed suit in an attempt to force the responsible parties to contribute to the cleanup costs. In similar cases, landowners initiate voluntary cleanups of contaminated sites, without the nudge of an enforcement action, and initiate CERCLA litigation to compel contribution from the liable parties. *See* Exhibit B.

As found by the Eighth Circuit, in either situation, CERCLA's purposes would be frustrated by a complete denial of federal jurisdiction over claims brought under the comprehensive federal law directed at cleaning up contaminated sites. *See Atlantic Research,* 459 F.3d at 830-831; *see also Dico, Inc. v. Diamond,* 35 F.3d 348, 349 (8th Cir. 1994) (CERCLA was enacted to remedy the serious environmental health risks posed by industrial pollution by "ensuring the prompt cleanup of hazardous waste sites and imposing the costs of such cleanups on responsible parties"). For this reason, the courts appropriately recognize an implied right of any party, including the owners and operators of a contaminated site, to seek contribution from other responsible parties under section 107(a). *Syms v. Olin Corp.,* 408 F.3d at 107 n.8 (2nd Cir. 2005) (*Syms*); *Key Tronic,* 511 U.S. at 816-817; *see also Pinal Creek Group v. Newmont Mining Corp,* 118 F.3d 1298 (9th Cir. 1997) (*Pinal Creek*).

Those on the other side of this issue contend that contribution actions of PRPs brought under section 107 prior to initiation of civil action by the government must be denied. However, as stated by the Ninth Circuit:

> [R]equiring a [section] 106 or [section] 107(a) action to be brought before a contribution action is allowed, would diminish the incentive of a PRP

> to remove hazardous substances voluntarily and reach a settlement with government agencies as to liability. That contribution may be sought after settlements as well as judgments is a well-established legal tradition. Suppose, for example, that after a car accident, the driver of each car is liable to an injured person. If one driver settles with the victim, he then can sue the other driver for contribution. It does not matter, for settlements or judgments, whether contribution is sought in the original or in a separate action.

Western Properties Serv. Corp. v. Shell Oil Co., 358 F.3d 678, 684 (9th Cir. 2004).

Thus, the comprehensive framework of CERCLA and the Superfund amendments simply cannot be read to omit *any* right of contribution for PRPs to initiate cleanup of contaminated sites. *See Syms*, 408 F.3d at 107, n.8. Such a result negates all progress and discourages proactive efforts to quickly initiate the cleanup (whether by voluntary efforts of private parties or state administrative orders), and subsequently seek cost recovery from all liable parties. *See Syms*, 408 F.3d 95. Denying PRPs the right to seek contribution under section 107 discourages "PRPs from voluntarily initiating cleanup, contrary to CERCLA's stated purpose of 'induc[ing] such persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites.'" *Id.* at 106 (citing H.R. Rep. No. 96-1016(I), at 17 (1980)). The absence of any avenue for PRPs to recover costs of cleanup before the government initiates a CERCLA action for a given contaminated site undermines CERCLA's primary goal of "encourag[ing] private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others." *Key Tronic*, 511 U.S. at 819.

Petitioner requests this Court to require owners of contaminated sites to sit back and wait for the government to pursue cleanup of the site. In so requesting, Petitioner actually seeks to dissolve any ability of a given landowner to "settle" with other responsible parties who have yet to be held accountable for the contamination by state or federal government agencies. Until someone brings a section 106 or 107 action to cleanup the contaminated site, there is simply no incentive for uncooperative responsible parties no longer connected to the site to come out from their respective hiding places and jump into a settlement agreement. The remote chance that the government will not pursue such an action in the foreseeable future is a sufficient disincentive to voluntarily entering a settlement. Where the State and landowner combined do not have sufficient funds to effectively clean up the site, the success of the cleanup hinges on litigation to pursue contribution from the uncooperative responsible parties. As evinced in the Kotrous situation, even an administrative enforcement action against past owners or operators of the site is insufficient to compel settlement or even compliance. *See* Exhibit B hereto. Meanwhile, the contamination at sites across the country, as well as those parties responsible for such contamination, continue to migrate.

CERCLA policy requires that owners of contaminated sites, such as Kotrous, be allowed to seek contribution from other PRPs for cleanup costs. In initiating section

107 civil actions, the owners facilitate the statutory goal of casting a broad net of liability. This Court's decision should facilitate CERCLA's goal of holding all responsible parties accountable for remediation of contaminated sites.

B. Kotrous Respectfully Urges This Court To Issue A Decision That Dispels Certain Myths That Continue To Be Raised To Prevent Property Owners From Pursuing Contribution In The Absence Of Government Enforcement.

Kotrous requests that this Court issue a ruling that dispels the following myths that plague the section 107 contribution discussion:

1. All owners or operators of contaminated sites are per se guilty of contamination and/or are bad actors, unless they took action to ensure "innocent landowner" status prior to purchasing contaminated property.

2. Allowing PRPs an implied right to section 107 contribution constitutes judicial legislation and opens wide the door for unendless joint and several cost recovery litigation.

3. Private cleanup actions are inherently irresponsible and inferior to those actions "supervised" by the federal government.

Kotrous suggests that each of these myths are false and without any merit, as set forth herein and in the *Atlantic Research* decision.

1. Private Owners of Contaminated Sites Have a Right to Pursue Contribution From Those Parties Responsible For the Contamination.

All owners or operators of contaminated sites are not necessarily bad actors. Congress apparently recognized this fact as CERCLA construes liberally the right of owners or operators of contaminated sites to sue for recovery of cleanup costs for their contaminated property. *See, e.g.,* 42 U.S.C. § 9607(e)(2) ("Nothing in this title [42 U.S.C. §§ 9601 *et seq.*] . . . shall bar a cause of action that *an owner or operator or any other person* subject to liability under this section, or a guarantor, *has or would have,* by reason of subrogation or otherwise against any person"), emphasis added. If Congress intended to limit the rights of "owners and operators" to sue other PRPs through the enactment of the Superfund amendments, then Congress would have amended section 107(e)(2) to reflect the limitations imposed on owners and operators by the Superfund amendments. Rather than expressing such a limitation, Congress instead created an additional savings clause within the text of section 113(f)(1). 42 U.S.C. § 9613(f)(1) (this subsection does not "diminish the right of any person to bring an action for contribution in the absence of a civil action under CERCLA section 106 or section 107").

2. Upholding an Implied Right to Contribution Under Section 107 Does Not Constitute Judicial Legislation or Inspire Unendless Litigation.

The legislative motives behind CERCLA confirm the validity of the Eighth Circuit's recognition of a contribution action for PRPs under section 107(a). CERCLA's

primary goals are to "force polluters to pay for costs associated with remedying their pollution," (*United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258 (3d Cir. 1992)), and "to ensure the prompt and effective cleanup of waste disposal sites, and to assure that parties responsible for hazardous substances bore the cost of remedying the conditions they created." *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1455 (9th Cir. 1986). To facilitate these goals, "CERCLA is designed to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others." *Key Tronic* at 819 n.13.

Disallowing PRPs to enforce the liability of all responsible parties discourages "PRPs from voluntarily initiating a clean-up, contrary to CERCLA's stated purpose of 'induc[ing] such persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites.'" *Syms,* 408 F.3d at 106, quoting H.R. Rep. No. 96-1016(I), at 17 (1980). Prohibiting PRPs from suing for contribution under section 106 or 107 "create[s] a perverse incentive for PRPs to wait until they are sued before incurring response costs." *Syms,* 408 F.3d at 106; *see also Pinal Creek,* 118 F.3d at 1301. Section 113 does not "govern" this right to contribution, but rather "creates a mechanism for apportioning" proportionate liability among PRPs during or following a section 106 or section 107 action or a government settlement.

Moreover, authorizing PRPs to seek contribution for cost recovery under section 107 is wholly distinguishable from allowing PRPs to seek joint and several liability from others. *Pinal Creek,* 118 F.3d at 1303, 1306. Nothing within the text of section 107 requires this Court to determine that section 107 only authorizes joint and

several liability. The text does not require such a ruling, nor does equity allow such an interpretation with respect to PRPs pursuing civil actions for contribution among other PRPs. *Id.* Section 107(a)(4)(A) allows governmental entities to recover "*all costs*" whereas section 107(a)(4)(B) allows private parties to recover *any other necessary costs.* This distinction allows this Court to hold that governmental entities may bring an action to hold PRPs liable for *all of its cleanup costs,* jointly and severally. Private parties, however, may only bring a civil action for *any necessary costs,* which equity limits to contribution against other PRPs for their fair share of responsibility.

3. Federal Policy Does Not Support the Suggestion That All Private Cleanups Are Inherently Irresponsible and Unsupervised.

Petitioner contends that this Court should deny private parties the right to initiate CERCLA action because government "supervised" cleanups are inherently superior. Appellants rely on no evidence in the record before this Court to suggest that Congress does not value private cleanup activities. Rather, as noted by Petitioner, Congress passed the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (Brownfields Act) in 2002. The Brownfields Act *encourages* private cleanup and redevelopment of contaminated property and authorizes public grants to support private cleanups. *See, e.g.,* 42 U.S.C. §§ 9604(k), 9607(o)-(r), 9628(a). In fact, the Brownfields Act limits the ability of the federal government to take enforcement action when "a person is conducting or has completed a response action. . . ." 42 U.S.C. § 9621(b)(1)(A)(ii). Though

the Brownfields Act is not now at issue before this Court, these provisions are indicative of Congress' support for private cleanup of contaminated sites.

III. CONCLUSION

Kotrous does not advocate for judicial legislation or any expansion of current litigation under CERCLA. Kotrous does, however, request that this Court adhere to the express Congressional goals of CERCLA in upholding the right of owners of contaminated sites to hold responsible parties accountable for the costs of prompt and complete cleanup of their property. Kotrous respectfully urges this Court to seriously consider the widespread implications of the ultimate decision in this case. For the foregoing reasons, Kotrous asks that this Court uphold the Eighth Circuit's proper interpretation of CERCLA in *Atlantic Research*.

Respectfully submitted,

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EXHIBIT A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES KOTROUS, individually and doing business as THE MATTRESS FACTORY,

Plaintiff,

v.

GOSS-JEWETT COMPANY OF NORTHERN CALIFORNIA, INC., et al.,

Defendants.

NO. CIV. S-02-1520 FCD JFM

ORDER

(Filed June 16, 2005)

This matter is before the court on motion to dismiss filed by defendant Bayer Cropscience, Inc., ("Bayer"). The motion seeks dismissal of the First, Third and Fourth Claims in Plaintiff, James Kotrous' ("Kotrous") First Amended Complaint for failure to state a claim on which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). In the event the court grants this motion, Bayer requests that the court decline to exercise supplemental jurisdiction over Kotrous' remaining state law claims. For the reasons stated herein, Bayer's motion is DENIED.[1]

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[1] Because oral argument will not be of material assistance, the court orders the matter submitted on the briefs. E.D. Cal. Local Rule 78-230.

BACKGROUND

The instant litigation concerns certain real property located at 4301 Power Inn Road in Sacramento, California ("the Site"). From approximately 1970 until 1996, the Site was leased by Goss-Jewett Company of Northern California ("Goss-Jewett"), a defendant in this action. (First Amended Complaint ("FAC") ¶ 8.) Goss-Jewett sold and distributed chemicals used by dry cleaning establishments, including the chemical perchloroethylene ("PCE").

As part of its operations at the Site, Goss-Jewett installed an above-ground storage tank, which was used to store up to 1,000 gallons of PCE prior to its delivery by truck to local dry cleaning businesses. Stauffer Chemical, a predecessor in interest to Bayer, supplied PCE to Goss-Jewett and delivered it by truck to the storage tank. (FAC ¶ 39.) During one or more of these deliveries, Stauffer Chemical "suddenly and accidentally released PCE to the soil and groundwater at the site . . . [resulting in] contamination of the environment." (FAC ¶ 40.)

During the period that Goss-Jewett operated its dry cleaning chemical supply business, ownership of the Site transferred on two occasions. From approximately 1968 to 1976, Albert and Estelle Evans, Esther Volz, Robert and Frances Carmany, and John and Mildred Spurlock co-owned the Site.[2] In 1976, ownership transferred to defendant Edward Anselmo ("Anselmo"), who sold the Site to Kotrous in October of 1995.

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[2] According to the FAC, Albert Evans, Estelle Evans, Esther Volz, Robert Carmany, Frances Carmany, and John Spurlock are deceased. Their respective estates have been named as defendants in this action.

In August of 1996, after Kotrous acquired ownership of the Site, hazardous substance contamination was discovered in soil beneath the storage tank. (FAC ¶ 41.) In 1998, Goss-Jewett conducted a well survey, which identified 35 water wells within 2,000 feet of the Site, including one private well used for domestic water supply. (FAC ¶ 42.) Goss-Jewett then sampled the private well and found it contained heightened levels of PCE. (*Id.*) The well was removed from service. (*Id.*).

In or about February of 2000, the California Regional Water Quality Control Board ("CRWQCB") sent Goss-Jewett a letter requesting a work plan for site assessment and evaluation of groundwater monitoring wells on property down-gradient from the Site. (FAC ¶ 43.) However, Goss-Jewett did not comply and has performed no further work at the Site since it sampled the domestic well in June of 1998, despite repeated requests by the CRWQCB. (*Id.*)

In November of 2001, the CRWQCB issued Cleanup and Abatement Order No. 5-01-714, which required Goss-Jewett and one of its officers, defendant Steven Lamanet ("Lamanet"), to investigate and remediate soil and groundwater contamination at the Site. (FAC ¶¶ 9, 44.) Kotrous was directed to conduct the work if Goss-Jewett and Lamanet failed to do so. (FAC ¶ 44.)

When Goss-Jewett and Lamanet failed to comply with deadlines in the first Cleanup Order, the CRWQCB rescinded that order and issued Cleanup and Abatement Order No. R5-2002-0707, which imposed obligations for site investigation and cleanup on Kotrous, Anselmo and Goss-Jewett. (*Id.*)

Kotrous commenced this action on July 15, 2002, asserting claims for contribution under CERCLA and the

California Hazardous Substance Account Act; declaratory relief under CERCLA, 42 U.S.C. § 9613(g)(2), the Declaratory Judgment Act, 28 U.S.C. § 2201, and state law; public and private nuisance; trespass; equitable indemnity; and injunctive relief. On April 26, 2005, Bayer filed the instant motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c).[3]

STANDARD

Rule 12(c) provides in relevant part that,

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

A defense of failure to state a claim upon which relief can be granted may be made by motion for judgment on the pleadings. Rule 12 (h)(2). In considering a motion for judgment on the pleadings presenting a defense of failure to state a claim upon which relief can be granted, this court should employ those standards normally applicable to a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). 5A

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[3] All further references to the "Rules" are to the Federal Rules of Civil Procedure unless otherwise noted.

Wright & Miller, *Federal Practice and Procedure*, Civil § 1367 at 515-16 (2d ed. 1990).

On a motion to dismiss, the allegations of the complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972). The court is bound to give the plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). Given that the complaint is construed favorably to the pleader, the court may not dismiss the complaint for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief. *Conley v. Gibson*, 355 U.S. 41, 45 (1957); *N.L. Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

Nevertheless, it is inappropriate to assume that plaintiff "can prove facts which it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). Moreover, the court "need not assume the truth of legal conclusions cast in the form of factual allegations." *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986).

ANALYSIS

Bayer contends that Kotrous' First Claim for contribution under CERCLA must be dismissed because Kotrous is not entitled to assert a claim under either of the two sections of CERCLA which authorize private actions for damages, § 107(a) and § 113(f).

Section 107(a) of CERCLA authorizes private entities to recover costs incurred in cleaning up hazardous waste disposal sites from responsible parties ("PRPs") as defined in the statute. 42 U.S.C. § 9607(a).

Section 113(f), which Congress added to CERCLA through the 1986 Superfund Amendments and Reauthorization Act ("SARA"), provides PRPs with an express right to contribution from other responsible parties. Under § 113(f), a responsible party may seek contribution, (1) "during or following any civil action under § 106 of this title or under § 107(a) of this title" or (2) where the PRP "has resolved its liability to the United States or a State for some or all of a response action . . . in an administrative or judicially approved settlement." 42 U.S.C. § 9613(f).

In *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 125 S. Ct. 577, 583 (2004), the Supreme Court held that a PRP who "voluntarily" incurs response costs (i.e., is not subject to a civil action under § 106 or § 107 and who has not entered into an administrative or judicially-approved settlement) cannot assert a claim for contribution under § 113(f). The court found that the clear language of the statute precluded any contrary result. *Id.*

Bayer contends that, in light of the Supreme Court's decision in *Aviall*, Kotrous cannot maintain a CERCLA contribution claim under § 113(f) because he was not subject to a civil action under § 106 or § 107(a), nor did he enter into a settlement with the federal or state government. The court need not decide whether the Kotrous could meet § 113(f)'s standing requirements because the Ninth Circuit recognized an implied right of contribution in § 107. *Pinal Creek*, 118 F.3d 1298, 1301 (citing *Key Tronic Corp. v. United States*, 511 U.S. 809, 814-815 (1994)

and *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457 n.3 (1986)); *Western Props. Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 685. The enactment of § 113 in 1986 did not replace the implicit right of contribution in § 107. *Western Props.*, 358 F.3d at 685. SARA contained a savings clause, which provides that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title." 42 U.S.C. § 9613(f)(1) Thus, under controlling Ninth Circuit precedent, a PRP may maintain a claim for contribution under § 107(a).

Bayer's argument that Kotrous' status as a PRP bars him from seeking *any* relief under § 107(a) is based on a mistaken interpretation of Ninth Circuit's decision in *Pinal Creek*. *Pinal Creek* held only that a PRP cannot maintain an action under § 107(a) *for joint and several liability*. *Pinal Creek*, 118 F.3d at 1302 (concluding that the PRP plaintiff was "foreclosed from imposing joint and several liability [on other PRPs]. . . .") However, nothing in *Pinal Creek* suggests that the court intended to abrogate its prior decisions finding an implied right to contribution in § 107(a). To the contrary, *Pinal Creek* clearly recognizes that § 107 incorporates such a claim.[4] *Id.* at 1301 (finding

[4] The court in *Aviall* expressed considerable skepticism regarding whether courts should find an implied right to contribution in § 107. *See Aviall*, 125 S. Ct. at 586 (noting that "[t]o the extent that Aviall chooses to frame its § 107 claim on remand as an implied right of contribution (as opposed to a right of cost recovery) we note that this Court has visited the subject of implied rights of contribution before," and citing cases rejecting the creation of such rights). However, the *Aviall* Court expressly did not decide this issue. *Id.* (" . . . we decline to decide whether *Aviall* has an implied right to contribution under § 107."). Because *Aviall* does not overrule the cases from this circuit

(Continued on following page)

that a claim for contribution is implicitly embedded in the text of § 107); *Western Props.*, 358 F.3d at 685.

Kotrous' First Claim for contribution expressly invokes § 107(a). (*See* FAC ¶¶ 47, 49, 56.) Thus, Kotrous has stated a claim for contribution under CERCLA.

CONCLUSION

For the reasons stated herein, Bayer's motion to dismiss Kotrous' First Claim for contribution under CERCLA is DENIED. Bayer's motion to dismiss Kotrous' Second through Fourth Claims is predicated on this court dismissing Kotrous' CERCLA claim. Accordingly, Bayer's motion to dismiss is DENIED in its entirety.

IT IS SO ORDERED.

DATED: June 16, 2005

/s/ Frank C. Damrell Jr.
FRANK C. DAMRELL, JR.
UNITED STATES
DISTRICT JUDGE

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that recognize an implied right to contribution in § 107, they remain good law and are binding on this court.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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JAMES KOTROUS, individually and doing business as THE MATTRESS FACTORY,

Plaintiff,

v.

GOSS-JEWETT COMPANY OF NORTHERN CALIFORNIA, INC., et al.,

Defendants.

NO. CIV. S-02-1520 FCD JFM

ORDER

– – ooOoo – –

This matter is before the court on motion for reconsideration pursuant to Eastern District Local Rule 78-2130(k) of this court's June 26, 2005 Memorandum and Order, filed by defendant Bayer Cropscience, Inc., ("Bayer").[1]

An order that resolves fewer than all of the claims among all of the parties "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Fed. R. Civ. P. 54(b); 18B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4478 (2d Ed. 2005) (while authorized, reconsideration of interlocutory orders disfavored). Where reconsideration of a non-final order is sought, the court has "inherent jurisdiction to modify, alter or revoke it." *United States v. Martin*, 226 F.3d 1042,

[1] Eastern District L.R. 78-230(k) provides the procedural rule for filing a motion for reconsideration of "any motion . . . granted or denied in whole or in part."

1048-49 (9th Cir. 2000), *cert denied*, 121 S. Ct. 1671 (2001). To succeed in a motion to reconsider, a party must set forth facts or law of a strongly convincing nature to induce the Court to reverse its prior decision. *See, e.g., Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F. Supp. 656,-665 (E.D. Cal.1986), aff'd in part and rev'd in part on other grounds, 828 F.2d 514 (9th Cir. 1987), cert. denied, 486 U.S. 1015 (1988).

Generally, and absent highly unusual circumstances, reconsideration is appropriate only where (1) the party presents the court with newly discovered evidence, (2) the court committed clear error or the initial decision was manifestly unjust, (3) there is an intervening change in controlling law.[2] *School Dist. No. 1J, Multnomah County, Oregon v. ACANDS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

The court has reviewed Bayer's memorandum in support of its motion for reconsideration and concludes that reconsideration is not warranted. Bayer interprets *Western Properties Service Corp. v. Shell Oil Corp.*, 358 F.3d 678 (9th Cir. 2004), differently than this court and disagrees with the court's conclusion that there is an implied right of contribution in CERCLA section 107(a) independent of section 113(f). However, this is not a valid

[2] While the standards applicable to motions for reconsideration of final judgments or orders under Rules 59(e) (final judgments) and 60(b) (final judgments and orders) technically do not delimit the court's inherent discretion to reconsider interlocutory orders, the court nonetheless finds them to be helpful guides to the exercise its discretion.

ground for reconsideration as the court has committed no clear error of law.[3]

IT IS SO ORDERED.

DATED: August 23, 2005.

/s/ Frank C. Damrell Jr.
FRANK C. DAMRELL, Jr.
UNITED STATES DISTRICT JUDGE

[3] Indeed, Bayer disagrees not just with this Court's interpretation of *Western Properties*, but that of a second judge in this district who reached the same conclusion in a recent CERCLA case. *See Adobe Lumber v. Taecker*, 2005 U.S. Dist. LEXIS 15374 (May 24, 2005).

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

– – ooOoo – –

JAMES KOTROUS, individually and doing business as THE MATTRESS FACTORY,

Plaintiff,

v.

GOSS-JEWETT COMPANY OF NORTHERN CALIFORNIA, INC., et al.,

Defendants.

NO. CIV. S-02-1520 FCD JFM

ORDER

– – ooOoo – –

This matter is before the court on defendant Bayer Cropscience Inc.'s motion for certification for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Defendant also moves to stay discovery proceedings if this court grants its motion for certification. Plaintiff James Kotrous and crossclaimant Edward Anselmo oppose the motions. For the reasons set forth below,[1] defendant's motions are GRANTED.

[1] Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D. Cal. Local Rule 78-230(h).

BACKGROUND[2]

Plaintiff commenced this action on July 15, 2002, asserting claims for contribution under CERCLA; declaratory relief under CERCLA and the Declaratory Judgment Act; and various claims under state law. (Pl's Compl., filed July 15, 2002). On April 26, 2005, defendant Bayer Cropscience Inc. filed a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). (Def.'s 12(c) Mot., filed Apr. 26, 2005). Defendant argued that plaintiff's contribution claims under CERCLA should be dismissed because plaintiff did not and could not allege the standing requirements of CERCLA § 113(f). (*Id.* at 2). Defendant further argued that plaintiff's remaining federal claims should be dismissed because they are predicated upon the contribution claim. (*Id.*) If all federal claims were dismissed, defendant argued that the state claims should be dismissed for lack of subject matter jurisdiction. (*Id.*)

On June 16, 2005, the court denied defendant's motion to dismiss. (Order, filed June 16, 2005). The court based its order on the Ninth Circuit's decisions in *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997), and *Western Properties Service Corp. v. Shell Oil Co.*, 358 F.3d 678 (9th Cir. 2004). (*Id.* at 7-8). In *Pinal Creek,* the Ninth Circuit concluded "that § 107 implicitly incorporates a claim for contribution." *Pinal Creek Group,* 118 F.3d at 1301. The Ninth Circuit further clarified that "the enactment of § 113 . . . did not replace the implicit right to contribution . . . recognized in § 107(a)." *W. Props.*

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[2] The facts of this case are set out in detail in the court's order denying defendant Bayer's motion to dismiss. (Order, filed June 16, 2005). Therefore, the court only discusses those facts relevant to defendant's motion for certification.

Serv. Corp., 358 F.3d at 685. Thus, the court held that a responsible party ("PRP") may maintain a claim for contribution under § 107 without meeting § 113 standing requirements. (Order, filed June 16, 2005, at 8). The court did not reach the issue of whether plaintiff could meet § 113(f)'s standing requirements because it relied on Ninth Circuit precedent recognizing an implied right of contribution in § 107. (*Id.* at 6-7).

On August 23, 2005, the court denied defendant's motion for reconsideration. (Order, filed Aug. 23, 2005). On September 6, 2005, defendant filed the instant motion to certify the court's June 16, 2005 order, and the related August 23, 2005 order for immediate interlocutory appeal. Defendant also moves to stay discovery proceedings if the court grants its motion for certification.

STANDARD

1. Interlocutory Appeal Under 28 U.S.C. § 1292(b)

The general rule is that an appellate court should not review a district court ruling until after entry of a final judgment. *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 474 (1978); *In re Cement Antitrust Litig.,* 673 F.2d 1020, 1026 (9th Cir. 1982), *aff'd sub nom. Arizona v. Ash Grove Cement Co.,* 459 U.S. 1190 (1983); *see* 28 U.S.C. § 1291. There is however, an exception to this general rule:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate

> termination of the litigation, he shall so state in writing in such order. The Court of Appeals . . . may thereupon . . . permit an appeal . . . if application is made to it within ten days. . . .

28 U.S.C. § 1292(b). The party seeking certification of an interlocutory appeal has the burden to show the presence of those exceptional circumstances. *Coopers & Lybrand,* 437 U.S. at 474-75.

Section 1292 identifies three factors that must be present in order for the court to certify an appeal. First, the issue to be certified must involve a controlling issue of law. An issue is "controlling" if "resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig.,* 673 F.2d at 1026 (citing *U.S. Rubber Co. v. Wright,* 359 F.2d 784, 785 (9th Cir. 1966)). Second, there must be substantial ground for difference of opinion on that issue. A party's strong disagreement with the court's ruling is not sufficient for there to be a "substantial ground for difference"; the proponent of an appeal must make some greater showing. *Kern-Tulare Water Dist. v. Bakersfield,* 634 F. Supp. 656, 667 (E.D. Cal. 1986), *aff'd in part and rev'd in part on other grounds,* 828 F.2d 514 (9th Cir. 1987). Third, an interlocutory appeal must be likely to materially speed the termination of the litigation. This factor is linked to whether an issue of law is "controlling" in that the court should consider the effect of a reversal by the court of appeals on the management of the case. *See In re Cement Antitrust Litig.,* 673 F.2d at 1026.

2. Stay Pending Appeal

Both Fed. R. Civ. P. 23(f) and 28 U.S.C. § 1292(b) give the district court discretion to stay the proceedings pending an appeal. Moreover, this court possesses the inherent power to control its own docket and calendar. *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983) (citations omitted).

> A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case. This rule . . . does not require that the issues in such proceedings are necessarily controlling of the action before the court.

Id. (quoting *Leyva v. Certified Grocers*, 593 F.2d 857, 863-64 (9th Cir. 1979).

ANALYSIS

1. Controlling Issue of Law

Defendant argues that the court's ruling with respect to whether a PRE must meet the standing requirements of CERCLA § 113 before bringing § 107 contribution claim is a controlling issue of law because resolution of the issue determines whether plaintiff's claims are viable. (Def.'s Mot., filed Sept. 5, 2005, at 4-5). If a § 107 contribution claim requires plaintiff to meet § 113 standing requirements, defendant argues that plaintiffs claims must be dismissed. (*Id.*) Defendant argues that plaintiff has not alleged compliance with § 113 standing requirements in his first amended complaint, nor could plaintiff likely

plead § 113 standing requirements if given leave to amend the complaint. (*Id.* at 5).

An issue is "controlling" if "resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig.*, 673 F.2d at 1026. If a PRP is required to fulfill the standing requirements of § 113 in order to bring contribution claims, plaintiff's federal claims for contribution under CERCLA may be dismissed. Plaintiff's other federal claims are for declaratory relief relating to rights, duties, and liabilities for future recovery of cost or damages. (Pl.'s First Amended Compl., filed Nov. 22, 2002, ¶¶ 67-72). These claims are dependant upon plaintiff's contribution claims. *See Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1191 (9th Cir. 2000). If plaintiff's federal claims for contribution must be dismissed for lack of standing, the federal declaratory relief claims will be dismissed, and plaintiff's complaint will only allege state law claims. The resolution of whether a PRP must meet § 113 standing requirements to bring an action for contribution will determine whether plaintiff has jurisdiction to bring an action in this court. Thus, the court's June 16, 2005 order denying Bayer's motion to dismiss includes a controlling issue of law.

Crossclaimant Anselmo argues that even if § 113 standing is required, the court will still have jurisdiction if plaintiff and crossclaimant are allowed to amend the complaint to state a cause of action for injunctive relief under the Resource Conservation and Recovery Act ("RCRA"). (Crossclaimant's Opp'n, filed Sept. 20, 2005, at 5-6). This argument is unavailing. A contribution action under CERCLA and an injunctive relief action under RCRA are two entirely different claims for relief. Even if the court grants leave to amend, the issue of whether

§ 107 contains an implied right of action separate from § 113 standing requirements is a controlling issue of law because it will materially affect the outcome of the litigation.

2. Substantial Ground for Difference of Opinion

Defendant argues that there is a substantial ground for difference of opinion as to whether a PRP must allege § 113 standing requirements in order to properly plead a § 107 contribution claim. (Def.'s Mot. at 5-6). Defendant points to the Supreme Court's decision in *Cooper Industries, Inc. v. Aviall,* 125 S.Ct. 577 (2004) and the decision of the Central District of California in *City of Rialto v. United State Department of Defense,* No. EDCV 04-00079 (C.D. Cal. filed Aug. 16, 2005). (*Id.*)

In *Aviall,* the Supreme Court held that a PRP who "voluntarily" incurs response costs cannot assert a claim for contribution under § 113(f). 125 S. Ct. at 583. The Court expressly declined to decide whether the plaintiff has an implied right of contribution under § 107. *Id.* at 586. However, the Court noted that it had "visited the subject of implied rights of contribution before" and cited cases rejecting the creation of such rights. *Id.* The Court did not overrule the cases from this circuit that recognize an implied right to contribution in § 107, but did express considerable skepticism regarding whether courts should find such an implied right. *Id.*

In *Rialto,* the Central District of California interpreted the Ninth Circuit's decisions in *Western Properties* and *Pinal Creek* as requiring a PRP to satisfy § 113 standing requirements in order bring a § 107 contribution claim. No. EDCV 04-00079, at 7-8. The *Rialto* court rejected the

plaintiff's argument that a § 107 contribution claim is available regardless of the a party's ability to satisfy § 113 standing requirements. *Id.* at 8-9. Specifically, the *Rialto* court held that, although the Ninth Circuit distinguished the matter decided in *Western Properties* from that decided by the Supreme Court in *Aviall* based upon the plaintiff's allegation under § 107(a), the Ninth Circuit ultimately based its conclusion that jurisdiction was proper upon the plaintiff's compliance with § 113 standing requirements. *Id.* at 9-10. Therefore, the *Rialto* court dismissed the plaintiff's claims for failure to allege facts that satisfy § 113 standing requirements. *Id.* at 14.

The Supreme Court's skepticism in *Aviall* in conjunction with the alternate interpretation of Ninth Circuit precedent by the district court in *Rialto* demonstrate that reasonable jurists may differ in determining the standing requirements for a CERCLA contribution claim. While two other district courts have agreed with this court's interpretation of Ninth Circuit precedent,[3] the issue is by no means unambiguous. Thus, a substantial ground for difference of opinion exists.

3. Materially Speed the Termination of Litigation

If § 113 standing requirements must be satisfied to bring a § 107 claim, plaintiff's CERCLA contribution

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[3] The Eastern District of California held that a PRP may bring a CERCLA § 107 claim without meeting § 113 standing requirements. *Adobe Lumber v. Taecker*, No. CV S02-186, 2005 WL 1367065, *1 (E.D. Cal. May 24, 2005). The Northern District of California also held that § 113 standing requirements did not need to be met. *Ferguson v. Arcata Redwood Co.*, No. C 03-05632, 2005 WL 1869445, *6 (N.D. Cal. Aug. 5, 2005).

claims may likely be dismissed, resulting in a lack of federal subject matter jurisdiction. Based upon the importance of this issue in determining the jurisdiction of the court, resolution of this issue by the Ninth Circuit will materially speed the termination of litigation.

4. Timeliness of Defendant's Certification Motion

Plaintiff and counterclaimant argue that defendant's motion 3 should be denied because it was not brought in a timely manner. Specifically, they contend that defendant's delay in bringing this motion until three months after the entry of this court's order waives the right to seek this remedy. (Counterclaimant's Opp'n at 2; Pl's Opp'n at 6-7). Section 1292(b) contemplates an expedited procedure for interlocutory appeals. *See Martens v. Smith Barney, Inc.*, 238 F. Supp. 2d 596, 600 (S.D.N.Y. 2002) (denying motion for interlocutory appeal where plaintiffs allowed almost months to pass before filing the motion and offered no reasonable explanation for the delay). However, in this case, there is a reasonable justification for defendant's delay. The Central District of California's decision in *Rialto* was filed on August 16, 2005. Defendant filed the motion on September 6, 2005. Therefore, because defendant filed this motion in a timely manner after discovering information relevant to the certification motion, plaintiff's argument that defendant's motion is untimely is unavailing.

5. Stay of Discovery Proceedings

Defendant requests a stay of discovery, pending the Ninth Circuit's ruling on the issue. (Def.'s Mot. at 7-8). "A district court has inherent discretion to control the

disposition of the causes on its docket in a manner which will promote economy of time and effort for itself, for counsel, and for litigants." *Filtrol Corp. v. Kelleher,* 467 F.2d 242 (9th Cir. 1972). Because the issue before the Ninth Circuit may be dispositive of plaintiff's federal claims, a stay of the proceedings at this point will promote economy of time and effort for both the parties and the court.

CONCLUSION

For the reasons stated herein, defendant's motion for certification pursuant to 28 U.S.C. § 1292(b) is GRANTED. Defendant's motion to stay proceedings pending the outcome of its interlocutory appeal is GRANTED. All dates are hereby VACATED.

IT IS SO ORDERED.

DATED: October 4, 2005.

/s/ Frank C. Damrell Jr.
FRANK C. DAMRELL, Jr.
UNITED STATES DISTRICT JUDGE

EXHIBIT B

California Regional Water Quality Control Board
Central Valley Region
Robert Schneider, Chair

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[LOGO]
Winston H. Hickox
Secretary for Environmental Protection

[SEAL]
Gray Davis
Governor

8 February 2002

CERTIFIED MAIL #
7000 0520 0024 2571 4089

Goss-Jewett Corp. of Northern California
and Mr. Steve Lamanet
c/o Mr. William Burns, Esq.
15720 Winchester Boulevard
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Mr. James Kotrous
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Mr. Edward Anselmo
770 Coronado Blvd
Sacramento, CA 95864

CLEANUP AND ABATEMENT ORDER NO. R5-2002-0707, MONITORING AND REPORTING PROGRAM NO. R5-2002-0801, GOSS-JEWETT CORPORATION FACILITY, SACRAMENTO, SACRAMENTO COUNTY

On 30 November 2001, I issued Cleanup and Abatement Order (CAO) No. 5-01-714 requiring investigation and cleanup of soil and groundwater at the former Goss-Jewett Corporation facility at 4301 Power Inn Road in Sacramento. At the same time, I issued Monitoring and Reporting Program (MRP) No. 5-01-842. Soil and groundwater beneath the site are polluted with tetrachloroethylene (PCE), with groundwater concentrations up to 8,100 ug/l, and no investigation or cleanup is currently underway.

CAO No. 5-01-714 was issued to Goss-Jewett Corporation of Northern California (Goss-Jewett), Mr. Steve Lamanet (vice president and general manager of Goss-Jewett), and Mr. James Kotrous (owner of the property at 4301 Power Inn Road). The CAO initially required Goss-Jewett and Mr. Steve Lamanet to perform the work to achieve compliance, but if those parties failed to do so, the CAO stated Mr. Kotrous would also be required to conduct the work. Neither Goss-Jewett nor Mr. Steve Lamanet has complied with the first two deadlines in the CAO.

Therefore, CAO No. 5-01-714 is hereby rescinded and enclosed is CAO Order No. R5-2002-0707. This CAO is issued to Goss-Jewett Corporation, Mr. Steve Lamanet, Mr. James Kotrous, and Mr. Edward Anselmo, the former owner of 4301 Power Inn Road. Mr. Anselmo leased the property to Goss-Jewett Corporation for about 20 years. Also enclosed is MRP No. R5-2002-0801, which requires the four parties to monitor the groundwater quarterly for

constituents of concern. This MRP replaces MRP No. 5-01-842, which is hereby rescinded.

Failure to comply with the provisions of the CAO and/or MRP could result in the Regional Board imposing civil liability, including liability up to one thousand dollars ($1,000) for each day that required technical reports are past due. Both Goss-Jewett and Steve Lamanet are also under a Probation Order through the Sacramento County District Attorney's Office. The DA's Office has informed us that noncompliance with the CAO also constitutes a violation of the Probation Order.

If you have any questions regarding the CAO or MRP, or need additional information, you may contact Wendy Cohen at (916) 255-3075.

/s/ Thomas R Pinkos
for GARY M. CARLTON
Executive Officer

Thomas R. Pinkos
Assistant Executive Officer

Enclosures

cc: Regional Board Members
Ms. Frances McChesney, Office of Chief Counsel, SWRCB, Sacramento
Mr. Darrin Polhemus, Compliance Assurance & Enforcement Unit, SWRCB, Sacramento
Ms. Lisa Burroughs, Esq., Sacramento County District Attorney's Office, Sacramento
Mr. Dana Booth, Sacramento County Environmental Management Department, Sacramento
Mr. Robert Randall, Jr., Procter & Gamble, Sacramento
Mr. Michael Lamanet, Goss-Jewett Co., Fresno
Mr. Jerry Fong, Carey & Carey, Palo Alto

CALIFORNIA REGIONAL WATER
QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

CLEANUP AND ABATEMENT
ORDER NO. R5-2002-0707
FOR
GOSS-JEWETT CORPORATION OF
NORTHERN CALIFORNIA, INC.,
STEVE LAMANET,
EDWARD ANSELMO,
AND JAMES KOTROUS
FORMER GOSS-JEWETT FACILITY
SACRAMENTO, SACRAMENTO COUNTY

This Order is issued to Goss-Jewett Corporation of Northern California, Inc. (Goss-Jewett), Steve Lamanet, Edward Anselmo, and James Kotrous based on provisions of California Water Code Section 13304, which authorizes the Regional Water Quality Control Board, Central Valley Region (Regional Board) to issue a Cleanup and Abatement Order. Goss-Jewett, Steve Lamanet, Edward Anselmo, and James Kotrous are hereafter collectively referred to as Discharger.

The Regional board finds, with respect to the Discharger's acts or failure to act, the following:

1. The property at 4301 Power Inn road, Sacramento (Attachment 1) is owned by James Kotrous. From 1976 until October 1995, the property was owned by Edward Anselmo. Goss-Jewett operated on the northern part of the property for about 25 years as a dry cleaning chemical distribution facility. Mr. Steve Lamanet is a vice president and the general manager of Goss-Jewett. Goss-Jewett leased the property from Edward Anselmo until October 1995. The existing lease continued until it expired in June 1996. The site

is currently occupied by The Matters Factory, a retail bedding store owned by Mr. Kotrous.

2. On 30 November 2001, the Executive Officer issued Cleanup and Abatement Order No. 5-01-714 to Goss-Jewett, Steve Lamanet, and James Kotrous. That Order stated Goss-Jewett and Mr. Lamanet were initially required to perform the work to achieve compliance, and if they failed to do so, Mr. Kotrous would be required to perform the work after notification by the Board and issuance of a revised Cleanup and Abatement Order. Neither Goss-Jewett nor Mr. Lamanet has complied with Order No. 5-01-714.

3. Edward Anselmo is subject to this Order because as the former owner of the property, he leased the property to Goss-Jewett and Steve Lamanet and permited them to conduct activities that caused waste to be discharged and deposited where it discharged into waters of the state and has created and threatens to create a condition of pollution or nuisance. James Kotrous is subject to this Order because as the owner of the property, he leased the property to Goss-Jewett and Steve Lamanet and permitted them to conduct activities that caused waste to be discharged or deposited where it discharged into waters of the state and has created and threatens to create a condition of pollution or nuisance. In addition, James Kotrous, as the current owner of the property, is a person who has caused or permitted waste to be discharged to waters of the state where it has created and threatens to create a condition of pollution or nuisance because he has knowledge of the discharge and the ability to control it. Goss-Jewett and Steve Lamanet are subject to this Order because they conducted activities at the property that caused or permitted waste to be discharged or deposited where it discharged into waters of the state and has created and threatens to create a condition of pollution or nuisance.

4. On 4 January 1996, Sacramento County Environmental Management Department (Sacramento County) and the City of Sacramento, Division of Hazardous Materials (City) responded to allegations from a former employee that Goss-Jewett was illegally storing hazardous materials at the site. Upon arrival, Sacramento County and City representatives observed approximately 100 55-gallon containers, some with unknown liquids, and a trailer that contained numerous chemical containers in various stages of degradation. Many of the containers had failed, and there were solids and liquids mixed on the floor of the trailer, which had major corrosion. Near the trailer was an aboveground storage tank (AGT) that contained about 800 to 1,000 gallons of tetrachloroethene (PCE). The PCE dispenser did not have a nozzle and, according to the Sacramento County incident report, "it appeared that there was a lot of perc [PCE] that had leaked into the soil." A near surface soil sample obtained near the PCE dispenser contained 300 ppm of PCE.

5. The AGT was removed at an unknown time in 1996. During August 1996, Goss-Jewett attempted to remove contamination by excavating soil from beneath the former AGT. A soil sample obtained at 6.5 feet below the ground surface (bgs) from the base of the excavation contained 330 ppm of PCE. Sacramento County assumed. lead regulatory agency status for the environmental cleanup after the soil excavation was completed.

6. On 10 January 1997, Kleinfelder, Inc., an environmental consulting firm, installed a soil vapor monitoring well (SVW-1) to 31 feet bgs at the location of the former AGT. Kleinfelder reported up to 3 ppm of PCE at 5 feet bgs in soil samples obtained from the boring for the well. Based on the results of the soil sampling, Sacramento County required Goss-Jewett to install a

groundwater monitoring well adjacent to the AGT. On 5 May 1997, Kleinfelder installed groundwater monitoring well MW-1 about 20 feet southeast of the former AGT. The groundwater sample obtained from MW-1 contained 2,700 µg/l of PCE.

7. On 4 December 1997, Ramage Environmental conducted a short-term (1.25 hours) soil vapor extraction test at SVW-1. Ramage did not analyze extracted soil vapors in the field or retain soil vapor samples for chemical analysis. The extraction test indicated that short-circuiting was not occurring but did not adequately assess the viability of a soil vapor extraction system.

8. In January 1998, Ramage installed groundwater monitoring well MW-2 about 50 feet northeast of the farmer AGT and groundwater/soil vapor monitoring well SVW-1A within the former AGT excavation. Groundwater samples obtained by Ramage in January 1998 contained 8,100 µg/l (SVW-1A), 6,400 µg/l (MW-1), and 1,300 µg/l (MW-2) of PCE, respectively.

9. Based on the results of the groundwater investigation, Sacramento County required Goss-Jewett to conduct a well survey. The well survey showed that 35 wells existed within 2,000 feet of the site, including a private well used for domestic supply within 500 feet south and downgradient from the site. Goss-Jewett subsequently sampled that well on 22 June 1998 and it contained 754 µg/l of PCE. The well was removed from service and municipal water was supplied the day the results were released to Sacramento County. Goss-Jewett has not conducted additional environmental investigation/remediation since the domestic well was sampled.

10. In a letter dated 28 September 1999, Sacramento County requested that the Regional Board assume

lead regulatory agency status for the environmental cleanup at the site. At the time of the request, the Sacramento County District Attorney was pursuing criminal charges against Goss-Jewett and Mr. Steve Lamanet for hazardous waste handling and storage violations.

11. On 20 January 2000, the District Attorney negotiated separate plea agreements with Goss-Jewett, which included a $100,000 fine and probation, and Mr. Lamanet, which included a $25,000 fine and probation.

12. On 17 February 2000, Regional Board staff sent Goss-Jewett a letter requesting a work plan for site assessment and an evaluation of groundwater monitoring wells on the Proctor & Gamble property south of the site for inclusion in the site investigation. Goss Jewett replied in an unsigned, undated letter received on 4 April that it "is no longer in a position to continue the program it started in 1995."

13. On 21 June 2000, the Board's Executive Officer sent Goss-Jewett Corp. and Steve Lamanet a letter requiring the following information pursuant to Section 13267 of the California Water Code:

    a. By 7 July 2000, the name and title of an officer of Goss-Jewett Corp. (Goss-Jewett's authorized representative) who will be responsible for all communications with the Board. All technical reports submitted by Goss-Jewett were required to include a statement signed by the authorized representative of Goss-Jewett certifying under penalty of law that the representative has examined and is familiar with the report and that to his knowledge, the report is true, complete, and accurate.

    b. By 21 July 2000, a work plan for site assessment prepared in general accordance with the attached outline that included a sufficient number of soil

borings and wells to determine the vertical and lateral extent of contaminants originating from the site.

c. By 21 July 2000, an evaluation of the location and historical groundwater data from the Proctor & Gamble (P&G) wells for potential incorporation in future groundwater contamination assessments. In a letter dated 9 July 1998, P&G recommended that its monitoring wells be included in the Goss-Jewett groundwater monitoring program.

d. By 22 December 2000, an interim remedial action plan for on-site soil and groundwater contamination.

Goss-Jewett Corp. and Mr. Lamanet have not submitted the required items

14. The Fourth Edition of the *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins* (Basin Plan) establishes beneficial uses of the waters of the state and water quality objectives to protect those uses. The beneficial uses of the groundwater beneath the site are domestic, municipal, industrial, and agricultural supply.

15. PCE is a refined hydrocarbon product, is not naturally-occurring, and is a known human carcinogen. Pollution of groundwater with elevated concentrations of PCE impairs the beneficial uses of the groundwater.

16. The water quality objectives in the Basin Plan for PCE include the state primary maximum contaminant level (MCL) specified in Title 22 California Code of Regulations and the Basin Plan's narrative toxicity objective for groundwater. The MCL for PCE is 5 µg/l and the numeric standard necessary to comply with

the narrative toxicity objective is 0.06 µg/l based on Department of Health Services Public Health Goal. The groundwater exceeds the water quality objectives for PCE. PCE is a waste as defined in Water code section 13050. The exceedance of applicable water quality objectives in the Basin Plan is pollution as defined in Water Code section 13050. The Discharger has caused or permitted waste to be discharged or deposited where it has discharged to waters of the state and has created, and continues to threaten to create, a condition of pollution or nuisance.

17. The State Water Resources Control Board has adopted Resolution No. 92-49, the *Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304*. This Policy sets forth the policies and procedures to be used during an investigation or cleanup of a polluted site and requires that cleanup standards be consistent with State Water Board Resolution 68-16 (the antidegradation policy). Resolution 92-49 and the Basin Plan establish the cleanup levels to be achieved Resolution 92-49 requires the waste to be cleaned up to background, or if that is not reasonable, to an alternative level that is the most stringent level that is economically and technologically feasible in accordance with Title 23 California Code of Regulations section 2550.4. Any alternative cleanup level to background must (1) be consistent with the maximum benefit to the people of the state; (2) not unreasonably affect present and anticipated beneficial use of such water; and (3) not result in water quality less than that prescribed in the Basin Plan and applicable Water Quality Control Plans and Policies of the State Water Resources Control Board.

18. Section 13304(a) of the California Water Code provides that:

"Any person who has discharged or discharges waste into waters of the state in violation of any waste discharge requirements or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the Regional Board clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including but not limited to, overseeing cleanup and abatement efforts. Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order. In any such suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant."

19. Section 13267(b) of the California Water Code provides that:

"In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of discharging, or who proposes to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of discharging, or who proposes to discharge waste outside of its region that could affect the quality of waters of the state within its region shall furnish, under penalty of perjury,

technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports."

The technical reports required by this Order are necessary to assure compliance with this Order. Existing data and information about the site indicates that waste, including PCE, has been discharged or is discharging at the property, which is owned, formerly owned, or leased by the Dischargers named in this Order.

20. Section 13304(c)(1) of the California Water Code provides that:

"... the person or persons who discharged the waste, discharges the waste, or threatened to cause or permit the discharge of the waste within the meaning of subdivision (a), are liable to that government agency to the extent of the reasonable costs actually incurred in cleaning up the waste, abating the effects of the waste, supervising cleanup or abatement activities, or taking other remedial actions..."

21. If the Discharger fails to comply with this Cleanup and Abatement Order, the Executive Officer may request the Attorney General to petition the superior court for the issuance of an injunction.

22. If the Discharger intentionally or negligently violates this Cleanup and Abatement Order, then the Discharger may be liable civilly in a monetary amount provided by the California Water Code.

23. The issuance of this Order is an enforcement action taken by a regulatory agency and is exempt from the provisions of the California Environmental Quality

Act, pursuant to Section 15321(a)(2), Title 14, California Code of Regulations.

24. Any person affected by this action of the Board may petition the State Water Resources Control Board (State Board) to review the action in accordance with Title 23 California Code of Regulations Sections 2050-2068. The State Board must receive the petition within 30 days of the date of this Order. Copies of the law and regulations applicable to filing petitions will be provided upon request. In addition to filing a petition with the State Board, any person affected adversely by this Order, may request the Regional Board to reconsider this Order. Such request should be made within 30 days of the date of this Order. Note that even if reconsideration by the Regional Board is sought, filing a petition with the State Board within the statutory time period is necessary to preserve the petitioner's legal rights.

IT IS HEREBY ORDERED that, pursuant to Section 13304 and Section 13267 of the California Water Code, Goss-Jewett Corporation of Northern California Inc., Steve Lamanet, Edward Anselmo, and James Kotrous shall:

1. Reimburse the Regional Water Quality Control Board for reasonable costs (as estimated by Board staff at the beginning of each fiscal year) associated with oversight of the cleanup of this facility. Failure to do so shall be considered a violation of this Order. By **15 March 2002**, submit the name and address of the person who will receive and be responsible for payment of invoices.

2. Investigate, clean up, and abate, forthwith, soil and groundwater polluted by activities at 4301 Power Inn Road, Sacramento, in conformance with the State Board's Resolution No. 92-49 *Policies and Procedures*

for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304 and with the Regional Board's *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins* (in particular the Policies and Plans listed within the Control Action Considerations portion of Chapter IV). "Forthwith" means as soon as is reasonably possible. Compliance with this requirement shall include, but not be limited to, completing the tasks listed below.

All site assessment work plans and reports and feasibility studies shall contain the information listed in Attachments 2, 3, and 4, respectively, which are made part of this Order. Work shall be conducted only after work plans are approved or conditionally approved by Regional Board staff. All reports shall include a cover letter from the Discharger stating concurrence or nonconcurrence with the conclusions and recommendations in the report.

As required by the California Business and Professions Code Sections 6735, 7835, and 7835.1, all reports shall be prepared by, or under the supervision of, a registered professional engineer or geologist and signed by the registered professional.

The Discharger shall complete the following tasks by the listed dates:

SITE ASSESSMENT

a. By **29 March 2002**, submit a work plan for site assessment of soil and groundwater pollution; which contains the information in Attachment 2. The work plan shall include a sufficient number of soil gas sampling points and wells to determine the vertical and lateral extent of contaminants originating from the site. The work plan also shall include a well survey identifying all

water supply wells within a ½-mile radius of the site and plans to sample these wells.

b. Within **30 days** of staff approval of the work plan for site assessment, implement the work plan in accordance with the approved time schedule, which shall become part of this Order.

c. Submit a site assessment report for soil and groundwater in accordance with the approved time schedule, but no later than **26 July 2002**. The site assessment report shall contain the information in Attachment 3 and include recommendations and a work plan for additional investigation, if needed. The work plan for additional investigation shall include a sufficient number of soil gas sampling points and wells to determine the vertical and lateral extent of pollutants originating from the site. Within **30 days** of staff approval of the work plan for additional site assessment, the Discharger shall implement the work plan and submit a site assessment report, which contains the information in Attachment 3, in accordance with the approved time schedule, which shall become part of this Order.

d. By **26 July 2002**, submit a plan to provide a replacement water supply for any water supply wells above the Department of Health Services' Public Health Goal of 0.06 µg/l.

SOIL FEASIBILITY STUDY AND REMEDIATION

e. By **23 August 2002**, submit a *Feasibility Study/ Remedial Options Evaluation Report* for remediation of the soil at the site, which contains the information in Attachment 4. The preferred alternative must meet the range of cleanup levels as described in the Basin Plan and Resolution

92-49. The Discharger shall attempt to clean up each constituent to background concentrations, or to the level that is technically and economically feasible and at least achieves the water quality objectives of the Basin Plan.

f. Within **30 days** of staff approval of the *Feasibility Study/Remedial Options Evaluation Report* but no later than **30 December 2002**, submit a *Soil Remedial Action Plan* which describes the approved alternative(s) for soil remediation and includes a time schedule to conduct the remediation activities. The approved time schedule to implement the soil remediation shall become a part of this Order.

g. Within **60 days** of Executive Officer approval of the *Soil Remedial Action Plan*, commence soil remediation or installation of the soil remediation system. The Discharger shall notify staff by telephone prior to beginning field work.

h. Within 120 days of Executive Officer approval of the *Soil Remedial Action Plan*, submit a report describing the status and results of the soil remedial work (*Soil Remedial Action Implementation Report*). The report shall also clearly show whether the installation of any remediation system is complete, and if not, give a schedule and proposed work plan for installation of the remaining soil remedial activities, including a proposed monitoring plan.

GROUNDWATER FEASIBILITY STUDY AND REMEDIATION

i. Within **60 days** of submittal of the *Soil Remedial Action Plan* but no later than **28 February 2003**, submit a *Feasibility Study/Remedial Options Evaluation Report* for remediation of the

groundwater at the site, which contains the information in Attachment 4. The preferred alternative must meet the range of cleanup levels as described in the Basin Plan and Resolution 9249. The Discharger shall attempt to clean up each constituent to background concentrations, or to the level that is technically and economically feasible and at least achieves the water quality objectives of the Basin Plan.

j. Within **60 days** of staff approval of the *Feasibility Study/Remedial Options Evaluation Report*, submit a *Groundwater Remedial Action Plan* which describes the approved alternative(s) for groundwater remediation and includes a time schedule to conduct the remediation. The approved time schedule to implement the groundwater remediation shall become a part of this Order.

k. Within **60 days** of staff approval of the *Groundwater Remedial Action Plan*, commence groundwater remediation or installation of the groundwater remediation system. The Discharger shall notify staff by telephone prior to beginning fieldwork.

l. Within **120 days** of staff approval of the *Groundwater Remedial Action Plan*, the Discharger shall submit a report describing the status and results of the groundwater remedial work (*Groundwater Remediation Implementation Report*). The report shall also clearly show whether the installation of any remediation system is complete, and if not, give a schedule and proposed work plan for installation of the remaining groundwater remedial activities, including a proposed monitoring plan.

m. The Discharger shall conduct periodic monitoring of groundwater and soil gas the existing wells and any additional wells in accordance with Monitoring and Reporting Program No. R5-2002-0801.

3. If, for any reason, the Discharger is unable to perform any activity or submit any document in compliance with the schedule set forth herein, or in compliance with any work schedule submitted pursuant to this Order and approved by the Executive Officer, the Discharger may request, in writing, an extension of the time specified. The extension request shall include justification for the delay. An extension shall be granted only by revision of this Order.

4. Upon startup of any remediation system(s), operate the remediation system(s) continuously, except for periodic and required maintenance. Any interruptions in the operation of the remediation system(s), other than for maintenance or emergencies, without prior approval from the Executive Officer is a violation of this Order.

5. Periodically optimize remedial systems and report on the effectiveness of the optimization in the Annual Report.

6. Notify Regional Board staff at least three working days prior to any onsite Work, testing or sampling.

7. Obtain all local and state permits and access agreements necessary to fulfill the requirements of this Order prior to beginning the work.

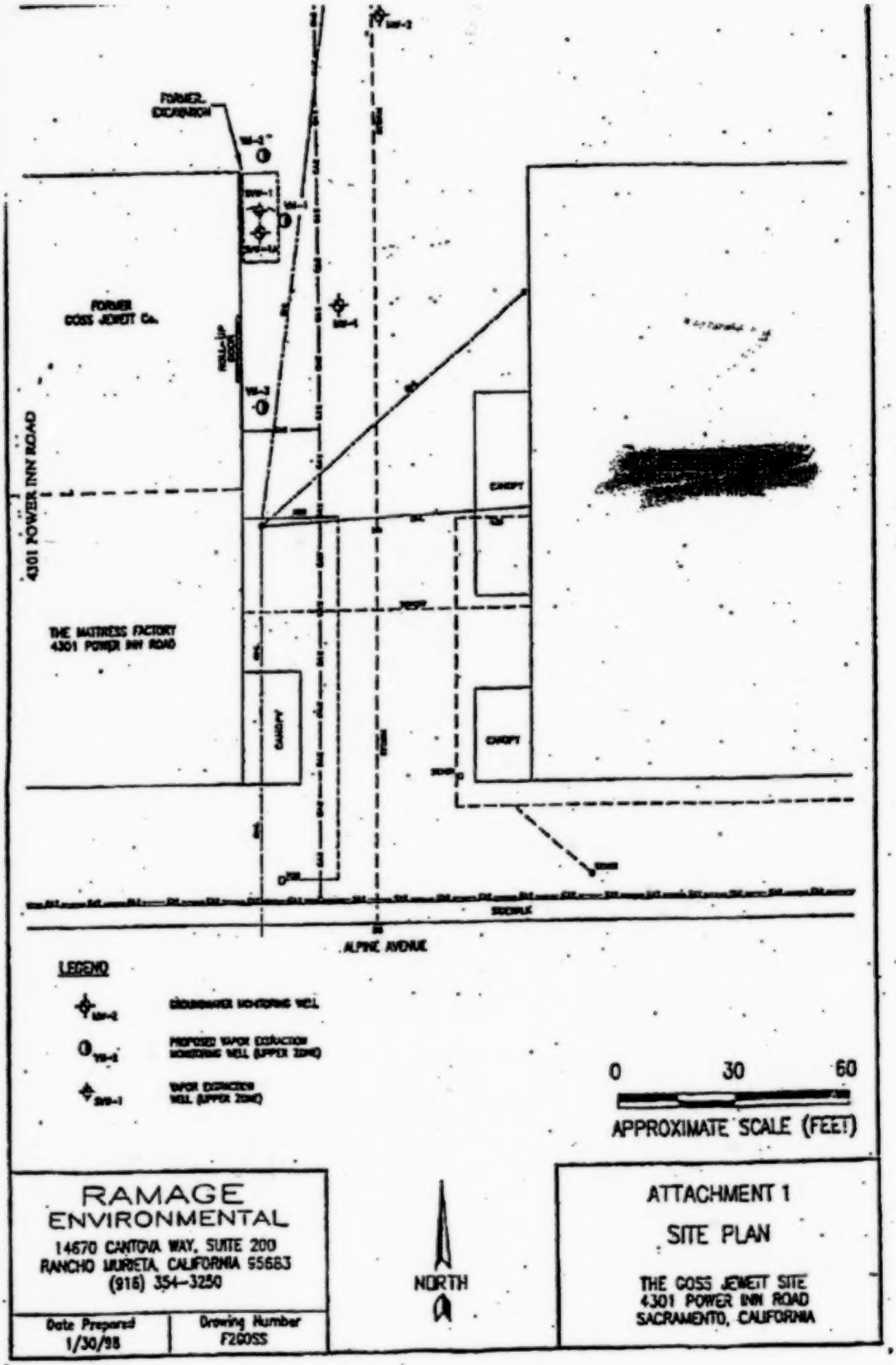
8. Continue any remediation or monitoring activities until such time as the Executive Officer determines that sufficient cleanup has been accomplished and this Order has been rescinded.

9. If, in the opinion of the Executive Officer, the Discharger fails to comply with the provisions of this Order, the Executive Officer may refer this matter to the Attorney General for judicial enforcement or may issue a complaint for administrative civil liability. The Executive Officer may also request action by the Sacramento County District Attorney.

This Order is effective upon the date of signature.

/s/ Gary M. Carlton
GARY M. CARLTON,
Executive Officer

8 FER 2002
(Date)


FORMER EXCAVATION
FORMER COSS JEWETT Co.
4301 POWER INN ROAD
THE MATTRESS FACTORY
4301 POWER INN ROAD
CANOPY
CANOPY
ALPINE AVENUE
LEGEND
0 30 60
APPROXIMATE SCALE (FEET)
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(916) 354-3250
Date Prepared
1/30/98
Drawing Number
F2COSS
ATTACHMENT 1
SITE PLAN
THE COSS JEWETT SITE
4301 POWER INN ROAD
SACRAMENTO, CALIFORNIA

California Regional Water Quality Control Board
Central Valley Region
Robert Schneider, Chair

Sacramento Main Office
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[LOGO]
Winston H. Hickox
Secretary for Environmental Protection

[SEAL]
Gray Davis
Governor

ATTACHMENT 2

ITEMS TO BE INCLUDED IN A SITE ASSESSMENT WORK PLAN

The outline below is a minimum requirement for items to be included and discussed in the text of all site assessment work plans submitted to the Board. All work plans must be signed by a registered geologist, certified engineering geologist, or civil engineer registered or certified by the State of California. Other pertinent information specific to each individual investigation also should be included.

I. BACKGROUND

A. *Site History*

State all operations conducted at the site.
Identify present and hisotric [sic] chemical usage and handling procedures.
List all chemical spills and their disposition.
Identify all past and present above ground and under ground tank locations.
Identify tank capacities and other specifications as necessary.
Identify tank contents, past and present.

Submit all records of tests or repairs on fuel lines and tanks.
Identify locations of maintenance shops, chemicals used in the shops, method of chemical storage and disposal.

B. *Topographic map of site vicinity showing:*
All natural and man-made drainage features including ditches and surface impoundments, and the drainages destination;
Utilities, especially storm drain system;
Location of existing monitoring wells, including those installed by other parties;
Location of above ground and underground storage tanks, other waste-handling facilities, and/or spill site;
Location of a major body of water relative to the site;
Location of any nearby private, municipal, or irrigation wells; and
Other major physical and man-made features.

C. *Geology/Hydrogeology*
Include proposal for logging of boreholes and characterizing site geology, and identifying unconfined or confined aquifers and contaminant flowpaths.

II. PREVIOUS SITE ASSESSMENTS

Provide a detailed description of any previous site assessment conducted to determine if there is any soil or ground water contamination. Include analytical results of all soil and water samples analyzed, and water level and floating product measurements.

III. FIELD INVESTIGATION

A. *General*
Monitoring well locations and rationale
Survey details

Equipment decontamination procedures
Health and safety plan

B. *Drilling Details*
Describe drilling and logging methods

C. *Monitoring Well Design*
Casing diameter
Borehole diameter
Depth of surface seal
Well construction materials
Diagram of well construction
Type of well cap
Size of perforations and rationale
Grain size of sand pack and rationale
Thickness and position of bentonite seal and sand pack
Depth of well, length and position of perforated interval

D. *Well Development*
Method of development to be used
Method of determining when development is complete
Method of development water disposal

E. *Soil Sampling*
Cuttings disposal method
Analyses to be run and methods
Sample collection and preservation method
Intervals at which soil samples are to be collected
Number of soil samples to be analyzed and rationale
Location of soil samples and rationale
QA/QC procedures

F. *Well Sampling*
Minimum time after development before sampling (48 hours)

Well purging method and amount of purge water
Sample collection and preservation method
QA/QC procedures

G. *Water Level Measurement*
Elevation reference point at each monitoring well shall be within 0.01 foot. Ground surface elevation at each monitoring well shall be within 0.1 foot. Method and time of water level measurement shall be specified.

IV. QA/QC PROCEDURES

Specify number of field blanks and duplicates.

V. TIME SCHEDULE FOR PROPOSED WORK

The work plan shall include a time schedule for implementation of work.

California Regional Water Quality Control Board
Central Valley Region
Robert Schneider, Chair

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Winston H. Hickox
Secretary for Environmental Protection

[SEAL]
Gray Davis
Governor

ATTACHMENT 3

ITEMS TO BE INCLUDED IN A SITE ASSESSMENT REPORT

The outline below is a minimum requirement for items to be included and discussed in the text of all site assessment reports submitted to the Board. Other supporting data to be included in the report, either within the text of the report or in appendices, are italicized at the end of each section. All reports must be signed by a registered geologist, certified engineering geologist, or civil engineer registered or certified by the State of California. Other pertinent information specific to each individual investigation also should be included.

I. INTRODUCTION

Summary of past investigations
Purpose of the recent investigation
Scope of the recent investigation
Time period in which the recent investigation was carried out

II. SUMMARY

Number of wells drilled
Results of soil and water analyses
Ground water flow direction and gradient
Possible source determination

III. FIELD INVESTIGATION

Well Construction

Number and depth of wells drilled
Date(s) wells drilled
Description of drilling and construction
Approximate locations relative to facility site(s)

Supporting Data:
A well construction diagram for each well should be included in the report which shows the following details:

Total depth drilled
Depth of open hole (same as total depth drilled if no caving occurs)
Footage of hole collapsed
Length of slotted casing installed
Depth of bottom of casing
Depth to top of sand pack
Thickness of sand pack
Depth to top of bentonite seal
Thickness of bentonite seal
Thickness of concrete grout
Boring diameter
Casing diameter
Casing material
Size of perforations
Number of bags of sand
Well elevation at top of casing
Depth to ground water
Date of water level measurement
Monitoring well number
Date drilled
Location

Well Development

Date(s) of development of each well
Method of development
Volume of water purged from well
How well development completion was determined
Method of effluent disposal

Supporting Data:

Field notes from well development should be included in report.

Water Sampling

Date(s) of sampling
How well was purged
How many well volumes purged
Levels of temperature, EC, and pH at stabilization
Sample collection, handling, and preservation methods
Sample identification
Analytical methods used

Soil Sampling

Date(s) of sampling
Sample collection, handling, and preservation method
Sample identification
Analytical methods used

IV. FINDINGS OF THE INVESTIGATION

Lithology

Types of sediments encountered
Presence, location, and lateral continuity of any significant sand, silt, or clay layers
Any visual signs of contamination

Supporting Data:

Well logs geologic cross-sections should be included in the report.

Analytical Results of Soil and Ground Water Sampling

Analytical results of each monitoring well should be summarized

Supporting Data:

Laboratory analytical sheets
Chain-of-custody forms

Water Levels

Static water levels measured when well drilled
Date(s) of water level measurements
Water levels determined prior to sampling

Supporting Data:

Dates of water level measurement, depths to ground water, and ground water elevations should be tabulated and included in the report.

Ground Water Gradient and Flow Direction

Ground water gradient and flow direction determined by the investigation should be discussed and compared to the regional gradient and flow direction.

Supporting Data:

A ground water contour map, drawn to scale, should be provided which shows each well, its ground water elevation, and lines of equal ground water elevation. Ground water gradient and flow direction should be shown on the map. The calculation of the gradient should be included.

V. RESULTS OF QA/QC

QA/QC procedures
QC sample identification
Field blank analyses
Comparison of duplicate sample results

VI. CONCLUSIONS AND RECOMMENDATIONS

Note any contamination found

Identify any suspected source of contamination, if possible

Recommend any further investigative needs

California Regional Water Quality Control Board
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Secretary for Environmental Protection

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Gray Davis
Governor

ATTACHMENT 4

ITEMS TO BE INCLUDED IN A FEASIBILITY STUDY/REMEDIAL OPTIONS EVALUATION REPORT

The outline below is a minimum requirement for items to be included and discussed in the text of all feasibility studies/remedial option evaluation reports submitted to the Board. Reports must be signed by a registered geologists, certified engineering geologist, or civil engineer registered or certified by the State of California.

I. Purpose of Feasibility Study/Remedial Options Evaluation

II. Background
   - A. Description of Facility
   - B. Site History
     1. Years of Operation
     2. Chemical Use
     3. Chemical Releases (Potential and Documented)

C. Geology
   1. Regional
   2. Local, soil type, lithology, lateral extent of lithologic units

D. Hydrogeology
   1. Aquifers, Aquitards, Perched Aquifers
   2. Groundwater flow rates, directions, recharge, discharge
   3. Groundwater Use
   4. Extraction and injection wells affect on groundwater flow

E. Surface Water
   1. Losing or gaining streams, ponds etc.
   2. Hydraulic connection with aquifers

F. Local Land Use

G. Previous Investigation and Remedial Actions

II. Nature and Extent of Contamination

A. Contaminants in Soils
   1. Types and Concentrations
   2. Lateral and Vertical Extent

B. Contaminants in Groundwater
   1. Types and Concentrations
   2. Lateral and Vertical Extent (including Perched Zones)

III. Contaminant Fate and Transport

A. Contaminant Properties
   1. Mobility
   2. Toxicity
   3. Half-life
   4. Chemical and biological degradation

B. Contaminant Transport based on Soil and Aquifer Properties

IV. Remedial Action Objectives

V. Description of Remedial Action Alternatives

VI. Evaluation of Remedial Action Alternatives

A. Overall Protectiveness of Human Health and the Environment

B. Compliance with Laws and Regulations

C. Long Term Effectiveness and Permanence

D. Reduction of Toxicity, Mobility, and Volume

E. Short Term Effectiveness

F. Implementability

G. Cost

F. State and Community Acceptance

VII. Potential Impacts of Remedial Actions

VIII. Estimated Project Schedule for Each Alternative

IX. Preferred Alternative

CALIFORNIA REGIONAL WATER
QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

MONITORING AND REPORTING
PROGRAM NO. R5-2002-0801
FOR
GOSS-JEWETT CORPORATION OF
NORTHERN CALIFORNIA, INC.
STEVE LAMANET, EDWARD ANSELMO,
AND JAMES KOTROUS
FORMER GOSS-JEWETT FACILITY
SACRAMENTO, SACRAMENTO COUNTY

Goss-Jewett Corporation of Northern California, Inc. (Goss-Jewett), Steve Lamanet, Edward Anselmo, and James Kotrous (hereafter collectively Discharger) own, owned, or operated at 4301 Power Inn Road, Sacramento (site; Attachment 1). James Kotrous currently owns the property, and Edward Anselmo owned the property from 1976 until October 1995. Goss-Jewett, with Steve Lamanet as vice president and general manager, operated on the northern part of the property for about 25 years as a dry cleaning chemical distribution facility. Groundwater at the site, which is about 60 feet below the ground surface, is polluted with tetrachloroethene (perchloroethylene; PCE), a dry cleaning solvent, and other volatile organic compounds (VOCs).

On 5 May 1997, Goss-Jewett installed a groundwater monitoring well (MW-1) approximately 20 feet southeast of a former aboveground storage tank (AGT) that was used to store PCE. The groundwater sample obtained from MW-1 contained 2,700 µg/l of PCE. In January 1998, Goss-Jewett installed groundwater monitoring well MW-2 about 50 feet northeast of the former AGT and groundwater/soil vapor monitoring well SVW-1A at the former AGT. Groundwater

samples obtained in January 1998 contained 8,100 µg/l (SVW-1A), 6,400 µg/l (MW-1), and 1,300 µg/l (MW-2) of PCE. No further sampling of the on-site wells has been conducted. PCE from Goss-Jewett has also been detected in a supply well at a private residence downgradient from the site and in supply and monitoring wells at Procter & Gamble (P&G), also downgradient from the site.

This Monitoring and Reporting Program (MRP) is issued pursuant to Section 13267 of the California Water Code and is necessary to delineate the groundwater contaminant plume and determine whether remediation efforts are effective. Existing data and information about the site shows the presence of various chemicals, including PCE and other VOCs, emanating from the property under the control of the Discharger and/or resulting from the Discharger's operation. The Discharger shall not implement any changes to this MRP unless and until a revised MRP is issued by the Executive Officer. This MRP replaces the requirements listed in MRP No. 5-01-842, which was issued on 30 November 2001.

Prior to construction of any new groundwater monitoring or extraction wells, the Discharger shall submit plans and specifications to the Board for review and approval. Once installed, all new wells shall be added to the monitoring program and shall be sampled and analyzed according to the schedule below.

GROUNDWATER MONITORING

As shown on Attachment 1, there are three groundwater monitoring wells on the site (MW-1 and SVW-1A) and adjacent property (MW-2). The groundwater monitoring program for the three monitoring wells, and any wells

installed subsequent to the issuance of this MRP shall follow the schedule below. Sample collection and analysis shall follow standard EPA protocol.

Constituents	EPA Analytical Method	Maximum Reporting Limit (µg/l)[1]	Sampling Frequency
Depth to Groundwater	–	–	Quarterly
Volatile Organic Compounds	8021B0 or 8260B	0.5	Quarterly

[1] For nondetectable results.

REPORTING

When reporting data, the Discharger shall arrange the information in tabular form so that the date, the constituents, and the concentrations are readily discernible. The data shall be summarized in such a manner as to illustrate clearly the compliance with this Order. If applicable, the Discharger shall notify the Board within 48 hours of any unscheduled shutdown of any soil vapor and/or groundwater extraction system.

As required by the California Business and Professions Code Sections 6735, 7835, and 7835.1, all reports shall be prepared by a registered professional or their subordinate and signed by the registered professional.

Quarterly reports shall be submitted to the Board by the **1st day of the second month following the end of each calendar quarter (i.e., by 1 February, 1 May, 1 August, and 1 November)** until such time as the Executive Officer determines that the reports are no longer

necessary. Each quarterly report shall include the following minimum information:

(a) a description of the quarterly groundwater sampling events, including field logs. At a minimum, field logs shall contain water quality parameters measured before, during, and after purging, method of purging, depth of water, volume of water purged, etc.;

(b) groundwater contour maps for all groundwater zones, if applicable;

(c) isocontour contaminant concentration maps for all monitored groundwater zones, if applicable;

(d) cumulative data tables containing the water quality analytical results and depth to groundwater;

(e) a copy of the laboratory analytical data report;

(f) if applicable, the status of any ongoing remediation, including cumulative information on the mass of contaminant removed from the subsurface, system operating time, the effectiveness of the remediation system, and any field notes pertaining to the operation and maintenance of the system; and

(g) if applicable, the reasons for and duration of all interruptions in the operation of any remediation system, and actions planned or taken to correct and prevent interruptions.

An annual report shall be submitted to the Board by **1 February** of each year. This report shall contain an evaluation of the effectiveness and progress of the investigation and remediation, and may be submitted with the fourth quarter monitoring report. The annual report shall contain the following minimum information:

(a) both tabular and graphical summaries of all data obtained during the previous year;

(b) groundwater contour maps and contaminant concentration maps containing all data obtained during the previous year;

(c) a discussion of the long-term trends in the concentrations of the pollutants in the groundwater monitoring wells;

(d) if applicable, an analysis of whether the contaminant plume is being captured by the extraction system or is continuing to spread;

(f) a description of all remedial activities conducted during the year, an analysis of their effectiveness in removing the contaminants, and plans to improve remediation system effectiveness;

(g) if applicable, the anticipated date for completion of cleanup or remediation activities;

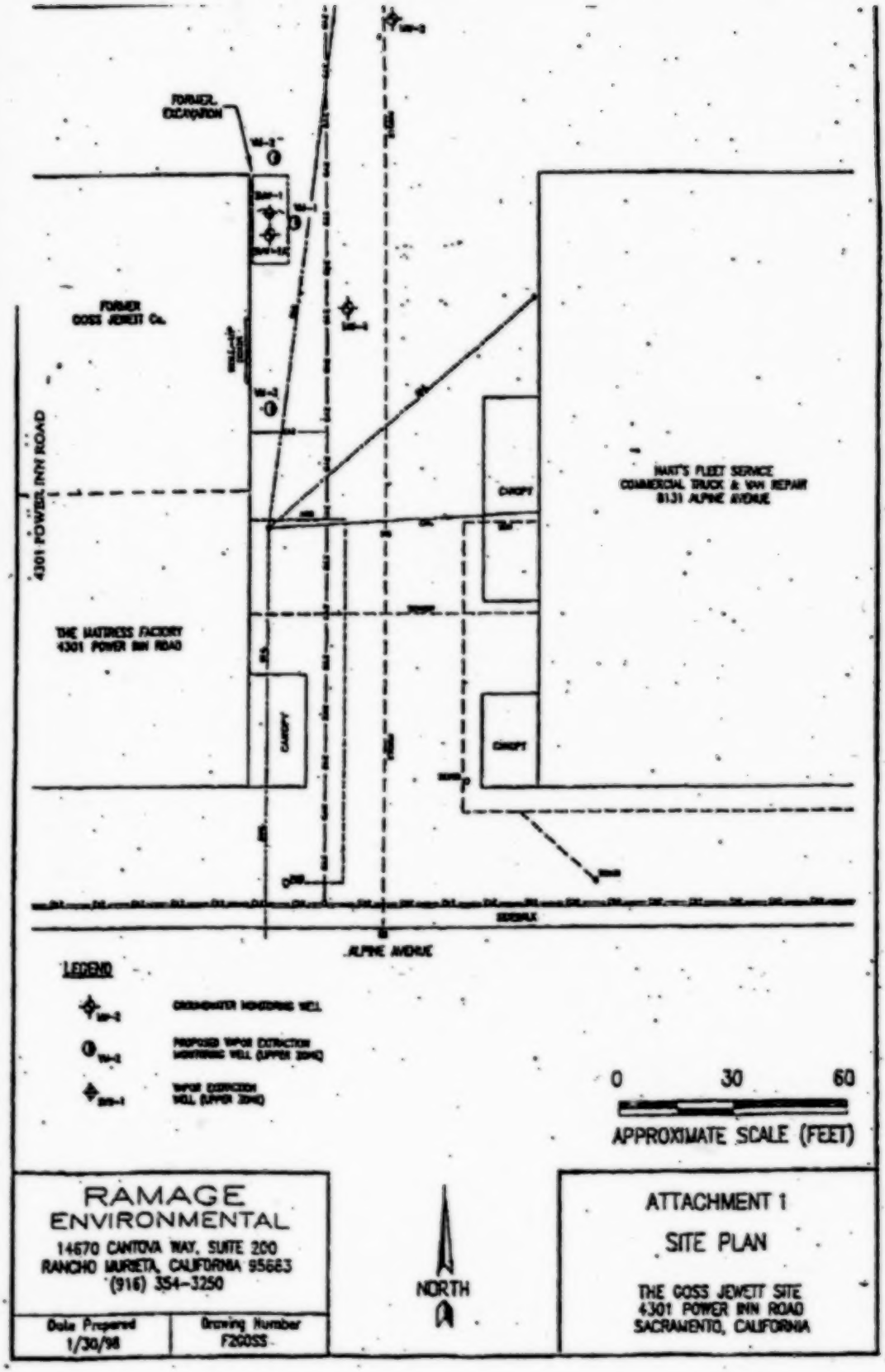
(h) an identification of any data gaps and potential deficiencies/redundancies in the monitoring system or reporting program;

(i) if desired, a proposal and rationale for any revisions to the groundwater sampling plan frequency and/or list of analytes.

The results of any monitoring done more frequently than required at the locations specified in the MRP also shall be reported to the Board. The Discharger shall implement the above monitoring program as of the date of the Order.

/s/ Gary M. Carlton
GARY M. CARLTON,
Executive Officer

8 FEB 2002
(Date)



RAMAGE ENVIRONMENTAL
14670 CANTOVA WAY, SUITE 200
RANCHO MURIETA, CALIFORNIA 95683
(916) 354-3250

Date Prepared	Drawing Number
1/30/98	FZGOSS

ATTACHMENT 1

SITE PLAN

THE GOSS JEWETT SITE
4301 POWER INN ROAD
SACRAMENTO, CALIFORNIA

California Regional Water Quality Control Board
Central Valley Region
Robert Schneider, Chair

Sacramento Main Office
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Winston H. Hickox
Secretary for Environmental Protection

[SEAL]
Gray Davis
Governor

17 June 2003

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Goss-Jewett Corp. of Northern California
and Mr. Steve Lamanet
c/o Mr. William Burns, Esq.
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Mr. Edward Anselmo
770 Coronado Blvd
Sacramento, CA 95864

FINAL REVISED CLEANUP AND ABATEMENT ORDER NO. R5-2003-0702, GOSS-JEWETT CORPORATION FACILITY, SACRAMENTO, SACRAMENTO COUNTY

On 8 February 2002, the Executive Officer (EO) of the Central Valley Regional Water Quality Control Board (Regional Board) issued Cleanup and Abatement Order (CAO) No. R5-2002-0707, requiring investigation and cleanup of soil and groundwater at the former Goss-Jewett Corporation facility at 4301 Power Inn Road in Sacramento. At the same time, the EO issued Monitoring and Reporting Program (MRP) No. R5-2002-0801. Soil and groundwater beneath the site are polluted with tetrachloroethylene (PCE), with groundwater concentrations up to 12,000 ug/l.

Cleanup and Abatement Order No. R5-2002-0707 was issued to Goss-Jewett, Steve Lamanet, James Kotrous and Edward Anselmo. Mr. Anselmo has completed substantial work in compliance with this Order, and based on this work it is appropriate to revise the Order to provide a reasonable schedule to perform the necessary additional assessment and remedial work. The revised CAO names the same responsible parties (RPs) as CAO No. R5-2002-0707. MRP No. R5-2002-0801 remains in place and requires the four RPs to monitor the groundwater quarterly for constituents of concern.

Failure to comply with the provisions of the CAO and/or MRP could result in the Regional Board imposing civil liability, including liability up to one thousand dollars ($1,000) for each day that required technical reports are past due. If you have any questions regarding the CAO or MRP, or need additional information, please call Wendy Cohen at (916) 255-3075.

/s/ Thomas R. Pinkos
THOMAS R. PINKOS
Executive Officer

Attachments

cc: Regional Board Members
Ms. Frances McChesney, Office of Chief Counsel, SWRCB, Sacramento
Ms. Eileen Burke-Moody, Esq., Sacramento County District Attorney's Office, Sacramento
Mr. Dana Booth, Sacramento County Environmental Management Department, Sacramento
Mr. Robert Randall, Jr., Procter & Gamble, Sacramento
Mr. Jerry Fong, Carey & Carey, Palo Alto
Mr. David W. Calfee III, Esq., Calfee & Young, Woodland
Mr. Ijaz Jamall, Risk-Based Decisions, Inc., Sacramento
Mr. Michael E. Vergara, Somach, Simmons & Dunn Sacramento

CALIFORNIA REGIONAL WATER QUALITY
CONTROL BOARD CENTRAL VALLEY REGION

CLEANUP AND ABATEMENT
ORDER NO. R5-2003-0702
FOR
GOSS-JEWETT CORPORATION OF NORTHERN
CALIFORNIA, INC.,
STEVE LAMANET,
EDWARD ANSELMO,
AND JAMES KOTROUS
FORMER GOSS-JEWETT FACILITY
SACRAMENTO, SACRAMENTO COUNTY

This Order is issued to Goss-Jewett Corporation of Northern California, Inc. (Goss-Jewett), Steve Lamanet, Edward Anselmo, and James Kotrous based on provisions of California Water Code Section 13304, which authorizes the California Regional Water Quality Control Board, Central Valley Region (hereafter Regional Board) to issue a Cleanup and Abatement Order (Order). Goss-Jewett, Steve Lamanet, Edward Anselmo, and James Kotrous are hereafter collectively referred to as Discharger.

The Regional Board finds, with respect to the Discharger's acts or failure to act, the following:

INTRODUCTION

1. Goss-Jewett operated a tetrachloroethylene (PCE) distribution facility at 4301 Power Inn Road, Sacramento as shown in Attachment 1, which is made part of this Order.

2. The property is owned ~~by James~~ Kotrous, who purchased it in October 1995. From 1976 until October 1995, the property was owned by Edward Anselmo. Goss-Jewett operated on the northern part of the

property for about 25 years. Mr. Steve Lamanet was a vice president and the general manager of Goss-Jewett. Goss-Jewett leased the property from Edward Anselmo until October 1995. The existing lease continued until it expired in June 1996. The site is currently occupied by The Mattress Factory, a retail bedding store owned by Mr. Kotrous.

3. On 30 November 2001, the Executive Officer issued Cleanup and Abatement Order No. 5-01-714 to Goss-Jewett, Steve Lamanet, and James Kotrous. That Order stated Goss-Jewett and Mr. Lamanet were initially required to perform the work to achieve compliance, and if they failed to do so, Mr. Kotrous would be required to perform the work after notification by the Board and issuance of a revised Cleanup and Abatement Order. Neither Goss-Jewett nor Mr. Lamanet complied with Order No. 5-01-714.

4. On 8 February 2002, the Executive Officer issued Cleanup and Abatement Order No. R5-2002-0707 to Goss-Jewett, Steve Lamanet, James Kotrous and Edward Anselmo. Edward Anselmo has completed substantial work in compliance with this Order, and based on this work it is appropriate to revise the Order to provide an accurate and reasonable schedule to perform necessary additional site assessment and remedial work.

5. Edward Anselmo and James Kotrous are subject to this Order because, as the former and current owners of the property, respectively, they leased the property to Goss-Jewett and Steve Lamanet, had knowledge of the type of business Goss-Jewett was engaged in and permitted them to conduct activities that caused waste to be discharged or deposited where it discharged into waters of the state and created and threatens to create a condition of pollution or nuisance. In addition, James Kotrous, as the current

owner of the property, is a person who has caused or permitted waste to be discharged to waters of the state where it has created and threatens to create a condition of pollution or nuisance because he had knowledge of the discharge and the ability to control it, including the ongoing movement of the waste from the soil to the groundwater and the continued movement of the groundwater plume. Goss-Jewett and Steve Lamanet are subject to this Order because they conducted activities at the property that caused or permitted waste to be discharged or deposited where it discharged into waters of the state and has created and threatens to create a condition of pollution or nuisance. Mr. Lamanet was onsite during facility operations and was directly involved in those operations.

BACKGROUND

6. On 4 January 1996, Sacramento County Environmental Management Department (Sacramento County) and the City of Sacramento, Division of Hazardous Materials (City) inspected the site and observed approximately 100 55-gallon containers in various stages of degradation. They also observed an aboveground storage tank (AGT) that contained tetrachloroethene (PCE). The PCE dispenser did not have a nozzle and, according to the Sacramento County incident report, "it appeared that there was a lot of perc [PCE] that had leaked into the soil." A near surface soil sample obtained near the PCE dispenser contained 300 ppm of PCE.

7. The AGT was removed at an unknown time in 1996. During August 1996, Goss-Jewett obtained a soil sample from 6.5 feet below the ground surface (bgs) at the site of the AGT, winch contained 340 ppm of PCE. Sacramento County assumed lead regulatory agency

status for the environmental cleanup after the soil excavation was completed.

8. Between December 1997 and June 1998, Goss-Jewett conducted investigations which included installation of a soil vapor extraction well and two groundwater monitoring wells. The viability of a soil vapor extraction system was not adequately assessed, but the investigations found groundwater contained up to 8,100 µg/l of PCE.

9. Based on the results of the groundwater investigation, Sacramento County required Goss-Jewett to conduct a well survey. The well survey records showed that 35 wells had been drilled within 2,000 feet of the site, including a private well used for domestic supply within 500 feet south and downgradient from the site. Goss-Jewett subsequently sampled that well on 22 June 1998 and it contained 754 µg/l of PCE. The well was removed from service and municipal water was supplied the day the results were released to Sacramento County. Goss-Jewett has not conducted additional environmental investigation/ remediation since the domestic well was sampled.

10. In a letter dated 28 September 1999, Sacramento County requested that the Regional Board assume lead regulatory agency status for the environmental cleanup at the site. At the time of the request, the Sacramento County District Attorney was pursuing criminal charges against Goss-Jewett and Mr. Steve Lamanet for hazardous waste handling and storage violations.

11. On 20 January 2000, the District Attorney negotiated separate plea agreements with Goss-Jewett, which included a $100,000 fine and probation, and Mr. Lamanet, which included a $25,000 fine and probation.

12. In 2000, Regional Board staff sent several letters to Goss-Jewett and Mr. Lamanet requiring work plans for site investigation and cleanup. Neither Goss-Jewett nor Mr. Lamanet submitted any of the required items.

13. Following issuance of Cleanup and Abatement Order No. R5-2002-0707, on 2 May 2002, Edward Anselmo signed the Acknowledgment of Receipt of Oversight Cost Reimbursement Account Letter in which he agreed to pay Regional Board staff costs for oversight of the cleanup and abatement.

14. On 26 August 2002, Risk-Based Decisions, Inc., (RBDI) an environmental consulting firm, submitted a *Preliminary Site Assessment Report* on behalf of Edward Anselmo with the results of a soil gas survey conducted in the area surrounding the former AGT and groundwater samples collected from the existing monitoring wells and downgradient domestic wells. They found up to 13,000 µg/l PCE in the soil vapor at a depth of 20 feet, and up to 17,000 µg/l PCE in an on-site monitoring well. Two industrial water supply wells used by the Pavestone Company at 4751 Power Inn Road, 1,200 feet downgradient of the Goss-Jewett facility, contained up to 6.4 µg/l. A well used for cooling water at the Proctor & Gamble facility about 2,800 feet downgradient had 9.2 µg/l PCE.

15. On 10 October 2002, RBDI submitted a preliminary *Feasibility Study/Remedial Options Evaluation Report* in which they recommended installing a soil vapor extraction (SVE) system as an interim remedial measure.

16. On 5 February 2003, RBDI submitted the *4th Quarter/Annual 2002 Groundwater Monitoring Report*, in which they reported that groundwater in on-site monitoring wells contained up to 7,800 µg/L PCE.

RBDI excavated about 20 cubic yards of soil from beneath the site of the former AGT, which has been shipped to a hazardous waste incinerator in Nevada.

17. During the 1st quarter of 2003, RBDI installed a SVE system. The SVE system started operating on 26 March 2003, and has been removing approximately 13 pounds of PCE per day. By the end of April 2003, the SVE system removed approximately 865 pounds of PCE.

18. On 9 April 2003, RBDI submitted a *Final Site Assessment Report* with the results of nine additional grab groundwater and monitoring well samples which attempted to define the lateral extent of the PCE groundwater plume. RBDI discovered a water supply well at the Rental Service Corporation, 4635 Power Inn Road, that was not included in the well survey. They found the well contained 24 µg/l PCE. RBDI also installed an upgradient monitoring well that contained 19 µg/l PCE. Additional site assessment work will be required to define the lateral and vertical extent of the plume and to confirm the presence of upgradient pollution.

AUTHORITY – LEGAL REQUIREMENTS

19. The Regional Board's *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins 4th Edition* (hereafter Basin Plan) designates beneficial uses of the waters of the State, establishes water quality objectives (WQOs) to protect these uses, and establishes implementation policies to implement WQOs. The beneficial uses of the groundwater beneath the site are domestic, municipal, industrial, and agricultural supply.

20. PCE is a refined hydrocarbon product, is not naturally-occurring, and is a known human carcinogen.

Pollution of groundwater with elevated concentrations of PCE impairs the beneficial uses of the groundwater.

21. WQOs listed in the Basin Plan include numeric WQOs, e.g., state drinking water maximum contaminant levels (MCLs) that are incorporated by reference, and narrative WQOs, including the narrative toxicity objective and the narrative tastes and odors objective for surface and groundwater. Chapter IV of the Basin Plan contains the *Policy for Application of Water Quality Objectives*, which provides that "[w]here compliance with narrative objectives is required (i.e., where the objectives are applicable to protect specified beneficial uses), the Regional Water Board will, on a case-by-case basis, adopt numerical limitations in orders which will implement the narrative objectives." The numerical limit for the constituent of concern listed in the following table implements the Basin Plan WQOs.

Constituent	Limits	WQO	Reference
PCE	0.06 µg/l	Narrative Toxicity	California Public Health Goal in Drinking Water – Office of Environmental Health Hazard Assessment

µg/l Micrograms per liter

22. The constituents listed in Finding No. 21 are wastes as defined in California Water Code Section 13050.

23. The groundwater exceeds the WQOs for the constituents listed in Finding No. 21. The exceedance of applicable WQOs in the Basin Plan constitutes pollution as defined in California Water Code Section 13050. The Discharger has caused or permitted waste to be discharged or deposited where it has discharged to waters of the state and has created, and continues to

threaten to create, a condition of pollution or nuisance.

24. The State Water Resources Control Board (hereafter State Board) has adopted Resolution No. 92-49, the *Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304*. This Policy sets forth the policies and procedures to be used during an investigation or cleanup of a polluted site and requires that cleanup levels be consistent with State Board Resolution 68-16, the *Statement of Policy With Respect to Maintaining High Quality of Waters in California*. Resolution 92-49 and the Basin Plan establish the cleanup levels to be achieved. Resolution 92-49 requires the waste to be cleaned up to background, or if that is not reasonable, to an alternative level that is the most stringent level that is economically and technologically feasible in accordance with Title 23, California Code of Regulations (CCR) Section 2550.4. Any alternative cleanup level to background must (1) be consistent with the maximum benefit to the people of the state; (2) not unreasonably affect present and anticipated beneficial use of such water, and (3) not result in water quality less than that prescribed in the Basin Plan and applicable Water Quality Control Plans and Policies of the State and Regional Boards.

25. Chapter IV of the Basin Plan contains the *Policy for Investigation and Cleanup of Contaminated Sites*, which describes the Regional Board's strategy for managing contaminated sites. This strategy is based on Water Code Sections 13000 and 13304, the Title 27, Division 2, Subdivision 1 regulations and State Water Board Resolution Nos. 68-16 and 92-49. The strategy includes site investigation, source removal or containment information required to be submitted for consideration in establishing cleanup levels, and the

bases for establishment of soil and groundwater cleanup levels.

26. The State Board adopted the *Water Quality Enforcement Policy*, which states in part: "At a minimum, cleanup levels must be sufficiently stringent to fully support beneficial uses, unless the RWQCB allows a containment zone. In the interim, and if restoration of background water quality cannot be achieved, the CAO should require the discharger(s) to abate the effects of the discharge. Abatement activities may include the provision of alternate water supplies." (Enforcement Policy, p. 19.)

27. Section 13304(a) of the California Water Code provides that:

"Any person who has discharged or discharges waste into waters of the state in violation of any waste discharge requirements or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the Regional Board clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including but not limited to, overseeing cleanup and abatement efforts. Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the Regional Board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order. In the suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant."

28. Section 13267(b) of the California Water Code provides that:

"In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge, waste outside of its region that could affect the quality of waters within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports."

The technical reports required by this Order are necessary to assure compliance with Section 13304 of the California Water Code. Existing data and information about the site indicates that waste has been discharged or is discharging at the property, which is or was owned or operated by the Dischargers named in this Order.

29. Section 13304(c)(1) of the California Water Code provides that:

" . . . the person or persons who discharged the waste, discharges the waste, or threatened to cause or permit the discharge of the waste within the meaning of subdivision (a), are liable to that government agency

to the extent of the reasonable costs actually incurred in cleaning up the waste, abating the effects of the waste, supervising cleanup or abatement activities, or taking other remedial actions . . . "

30. If the Discharger fails to comply with this Order, the Executive Officer may request the Attorney General to petition the superior court for the issuance of an injunction.

31. If the Discharger intentionally or negligently violates this Order, then the Discharger may be liable civilly in a monetary amount provided by the California Water Code.

32. The issuance of this Order is an enforcement action taken by a regulatory agency and is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, Section 21000, et seq.), pursuant to Title 14 CCR Section 15321(a)(2). The implementation of this Order is also an action to assure the restoration of the environment and is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, Section 21000, et seq.), in accordance with Title 14 CCR, Sections 15308 and 15330.

33. Any person affected by this action of the Regional Board may petition the State Board to review the action in accordance with Title 23 CCR Sections 2050-2068. The regulations may be provided upon request and are available at www.swrcb.ca.gov. The State Board must receive the petition within 30 days of the date of this Order.

REQUIRED ACTIONS

IT IS HEREBY ORDERED that Cleanup and Abatement Order No. R5-2002-0707 is rescinded, and pursuant to

California Water Code Section 13304 and Section 13267, Goss-Jewett Corporation of Northern California Inc., Steve Lamanet, Edward Anselmo, and James Kotrous shall:

1. Investigate the discharges of waste, clean up the waste, and abate the effects of the waste, forthwith, resulting from activities at the former Goss-Jewett facility at 4301 Power Inn Road, Sacramento, in conformance with State Board Resolution No. 92-49 *Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304* and with the Regional Board's *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins* (in particular the Policies and Plans listed within the Control Action Considerations portion of Chapter IV). "Forthwith" means as soon as is reasonably possible. Compliance with this requirement shall include, but not be limited to, completing the tasks listed below.

SITE ASSESSMENT

2. Within 30 days of staff concurrence with the 23 May 2003 *Workplan for Additional Site Assessment, 4301 Power Inn Road Sacramento, California*, implement the work plan and submit an *Additional Site Assessment Report*, which contains the information in Attachment 3, in accordance with the approved time schedule, which shall become part of this Order, and include recommendations and a work plan for additional investigation, if needed. The work plan for additional investigation shall contain information in Attachment 2, including a sufficient number of sampling points and wells to determine the vertical and lateral extent of pollutants.

FEASIBILITY STUDY AND CLEANUP

3. By 15 October 2003, submit a *Feasibility Study/ Remedial Options Evaluation Report* for soil and groundwater cleanup. The report shall contain the information in Attachment 4, which is made part of this Order. The proposed preferred alternative for groundwater must meet the range of cleanup levels as described in the Basin Plan and Resolution No. 92-49. The Discharger shall attempt to clean up each constituent to background concentrations, or to the level that is technically and economically feasible and at least achieves the Water Quality Objectives of the Basin Plan.

4. Within **60 days** of staff concurrence with the *Feasibility Study/Remedial Options Evaluation Report* for soil and groundwater cleanup, submit a *Cleanup Plan*, which describes the preferred alternative(s) for cleanup and includes a time schedule to conduct the cleanup activities. The approved time schedule to implement the cleanup shall become a part of this Order.

5. Within **60 days** of Executive Officer approval of the *Cleanup Plan* for soil and groundwater, commence cleanup or installation of the cleanup system. The Discharger shall notify staff a minimum of 72 hours prior to beginning field work.

6. Within **120 days** of Executive Officer approval of the *Cleanup Plan*, submit a report describing the status and results of the cleanup work (*Cleanup Implementation Report*). The report shall clearly show whether the installation of any cleanup system is complete, and if not, give a schedule and proposed work plan for installation of the remaining cleanup activities, including a proposed monitoring plan.

GROUNDWATER MONITORING

7. Conduct monitoring of the existing wells and any additional wells in accordance with MRP No. R5-2002-0801 or any revised MRP issued by the Executive Officer.

GENERAL REQUIREMENTS

8. Continue to reimburse the Regional Board for reasonable costs associated with oversight of the cleanup of this facility. Failure to do so shall be considered a violation of this Order.

9. Conduct work only after work plans are concurred with by Regional Board staff.

10. Submit all reports with a cover letter from the Discharger.

11. Seven days prior to conducting any field work, submit a Health and Safety Plan that is adequate to ensure worker and public safety during the field activities in accordance with CCR Title 8, Section 5192.

12. As required by the California Business and Professions Code Sections 6735, 7835, and 7835.1, have all reports prepared by, or under the supervision of, a registered professional engineer or geologist and signed by the registered professional. All technical reports submitted by the Discharger shall include a statement signed by the authorized representative certifying under penalty of law that the representative has examined and is familiar with the report and that to his knowledge, the report is true, complete, and accurate.

13. Upon startup of any remediation system(s), operate the remediation system(s) continuously, except for periodic and required maintenance or unpreventable

equipment failure. The Discharger shall notify the Regional Board within 24 hours of any unscheduled shutdown of the remediation system(s) that lasts longer than 48 hours. This notification shall include the cause of the shutdown and the corrective potion taken (or proposed to be taken) to restart the system. Any interruptions in the operation of the remediation system(s), other than for maintenance, emergencies, equipment failure, or requirements of other applicable regulatory agencies, without prior approval from Regional Board staff or without notifying the Regional Board within the specified time is a violation of this Order.

14. Optimize remedial systems as needed to improve system efficiency, operating time and/or pollutant removal rates, and report on the effectiveness of the optimization in the Annual Report.

15. Notify Regional Board staff at least three working days prior to any onsite work, testing, or sampling that pertains to environmental remediation and investigation and is not routine monitoring, maintenance, or inspection.

16. Obtain all local and state permits and access agreements necessary to fulfill the requirements of this Order prior to beginning the work.

17. Continue any remediation or monitoring activities until such time as the Executive Officer determines that sufficient cleanup has been accomplished to fully comply with this Order and this Order has been rescinded.

18. If, for any reason, the Discharger is unable to perform any activity or submit any document in compliance with the schedule set forth herein; or in compliance with any work schedule submitted pursuant to this

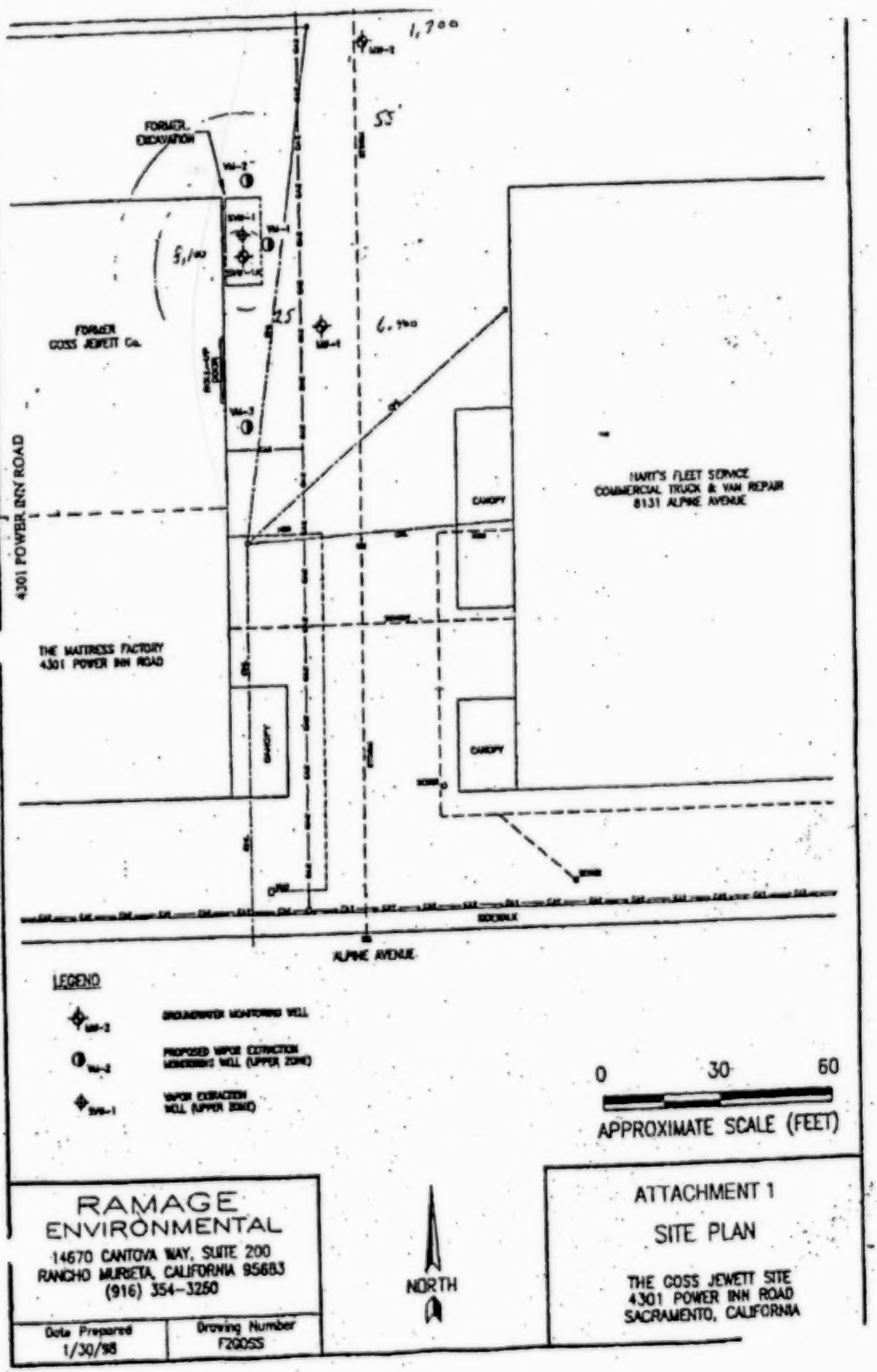
Order and approved by the Executive Officer, the Discharger may request, in writing, an extension of the time specified. The extension request shall include justification for the delay. An extension may be granted by revision of this Order or by a letter from the Executive Officer.

19. If, in the opinion of the Executive Officer, the Discharger fails to comply with the provisions of this Order, the Executive Officer may refer this matter to the Attorney General for judicial enforcement or may issue a complaint for administrative civil liability.

This Order is effective upon the date of signature.

/s/ Thomas R. Pinkos
THOMAS R. PINKOS,
Executive Officer

17 June 2003
(Date)



RAMAGE ENVIRONMENTAL
14670 CANTOVA WAY, SUITE 200
RANCHO MURIETA, CALIFORNIA 95683
(916) 354-3250

Date Prepared	Drawing Number
1/30/98	F2GOSS

ATTACHMENT 1

SITE PLAN

THE GOSS JEWETT SITE
4301 POWER INN ROAD
SACRAMENTO, CALIFORNIA

California Regional Water Quality Control Board
Central Valley Region
Robert Schneider, Chair

Sacramento Main Office
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Winston H. Hickox
Secretary for Environmental Protection

[SEAL]
Gray Davis
Governor

17 June 2003

ATTACHMENT 2

ITEMS TO BE INCLUDED IN A SITE ASSESSMENT WORK PLAN

The outline below is a minimum requirement for items to be included and discussed in the text of all site assessment work plans submitted to the Board. All work plans must be signed by a registered geologist, certified engineering geologist, or civil engineer registered or certified by the State of California. Other pertinent information specific to each individual investigation also should be included.

I. BACKGROUND

A. *Site History*

State all operations conducted at the site.

Identify present and historical chemical usage and handling procedures.

List all chemical spills and their disposition.

Identify all past and present above ground and under ground tank locations.

Identify tank capacities and other specifications as necessary.

Identify tank contents, past and present.
Submit all records of tests or repairs on fuel lines and tanks.
Identify locations of maintenance shops, chemicals used in the shops, method of chemical storage and disposal.

B. *Topographic map of site vicinity showing:*
All natural and man-made drainage features including ditches and surface impoundments, and the drainages destination;
Utilities, especially storm drain system;
Location of existing monitoring wells, including those installed by other parties;
Location of above ground and underground storage tanks, other waste-handling facilities, and/or spill site;
Location of a major body of water relative to the site;
Location of any nearby private, municipal, or irrigation wells; and
Other major physical and man-made features.

C. *Geology/Hydrogeology*
Include proposal for logging of boreholes and characterizing site geology, and identifying unconfined or confined aquifers and contaminant flowpaths.

II. PREVIOUS SITE ASSESSMENTS

Provide a detailed description of any previous site assessment conducted to determine if there is any soil or ground water contamination. Include analytical results of all soil and water samples analyzed, and water level and floating product measurements.

III. FIELD INVESTIGATION

A. *General*
Monitoring well locations and rationale
Survey details
Equipment decontamination procedures
Health and safety plan

B. *Drilling Details*
Describe drilling and logging methods

C. *Monitoring Well Design*
Casing diameter
Borehole diameter
Depth of surface seal
Well construction materials
Diagram of well construction
Type of well cap
Size of perforations and rationale
Grain size of sand pack and rationale
Thickness and position of bentonite seal and sand pack
Depth of well, length and position of perforated interval

D. *Well Development*
Method of development to be used
Method of determining when development is complete
Method of development water disposal

E. *Soil Sampling*
Cuttings disposal method
Analyses to be run and methods
Sample collection and preservation method
Intervals at which soil samples are to be collected
Number of soil samples to be analyzed and rationale
Location of soil samples and rationale
QA/QC procedures

F. *Well Sampling*

Minimum time after development before sampling (48 hours)

Well purging method and amount of purge water

Sample collection and preservation method

QA/QC procedures

G. *Water Level Measurement*

Elevation reference point at each monitoring well shall be within 0.01 foot. Ground surface elevation of each monitoring well shall be within .01 foot. Method and time of water level measurement shall be specified.

IV. QA/QC PROCEDURES

Specify number of field blanks and duplicates.

V. TIME SCHEDULE FOR PROPOSED WORK

The work plan shall include a time schedule for implementation of work.

California Regional Water Quality Control Board
Central Valley Region
Robert Schneider, Chair

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[LOGO]
Winston H. Hickox
Secretary for Environmental Protection

[SEAL]
Gray Davis
Governor

17 June 2003

ATTACHMENT 3

ITEMS TO BE INCLUDED IN A SITE ASSESSMENT REPORT

The outline below is a minimum requirement for items to be included and discussed in the text of all site assessment reports submitted to the Board. Other supporting data to be included in the report, either within the text of the report or in appendices, are italicized at the end of each section. All reports must be signed by a registered geologist, certified engineering geologist, or civil engineer registered or certified by the State of California. Other pertinent information specific to each individual investigation also should be included.

I. INTRODUCTION

Summary of past investigations
Purpose of the recent investigation
Scope of the recent investigation
Time period in which the recent investigation was carried out

II. SUMMARY

Number of wells drilled
Results of soil and water analyses
Ground water flow direction and gradient
Possible source determination

III. FIELD INVESTIGATION

Well Construction

Number and depth of wells drilled
Date(s) wells drilled
Description of drilling and construction
Approximate locations relative to facility site(s)

Supporting Date:

A well construction diagram for each well should be included in the report which shows the following details:

Total depth drilled
Depth of open hole (same as total depth drilled if no caving occurs)
Footage of hole collapsed
Length of slotted casing installed
Depth of bottom of casing
Depth to top of sand pack
Thickness of sand pack
Depth to top of bentonite seal
Thickness of bentonite seal
Thickness of concrete grout
Boring diameter
Casing diameter
Casing material
Size of perforations
Number of bags of sand
Well elevation at top of casing
Depth to ground water
Date of water level measurement
Monitoring well number
Date drilled
Location

Well Development

Date(s) of development of each well
Method of development
Volume of water purged from well
How well development completion was determined
Method of effluent disposal

Supporting Date:

Field notes from well development should be included in report.

Water Sampling

Date(s) of sampling
How well was purged
How many well volumes purged
Levels of temperature, EC, and pH at stabilization
Sample collection, handling, and preservation methods
Sample identification
Analytical methods used

Soil Sampling

Date(s) of sampling
Sample collection, handling, and preservation method
Sample identification
Analytical methods used

IV. FINDINGS OF THE INVESTIGATION

Lithology

Types of sediments encountered
Presence, location, and lateral continuity of any significant sand, silt, or clay layers
Any visual signs of contamination

Supporting Date:

Well logs geologic cross-sections should be included in the report.

Analytical Results of Soil and Ground Water Sampling

Analytical results of each monitoring well should be summarized

Supporting Data:

Laboratory analytical sheets
Chain-of-custody forms

Water Levels

Static water levels measured when well drilled
Date(s) of water level measurements
Water levels determined prior to sampling

Supporting Date:

Dates of water level measurement, depths to ground water, and ground water elevations should be tabulated and included in the report.

Ground Water Gradient and Flow Direction

Ground water gradient and flow direction determined by the investigation should be discussed and compared to the regional gradient and flow direction.

Supporting Date:

A ground water contour map, drawn to scale, should be provided which shows each well, its ground water elevation, and lines of equal ground water elevation. Ground water gradient and flow direction should be shown on the map. The calculation of the gradient should be included.

V. RESULTS OF QA/QC

QA/QC procedures
QC sample identification
Field blank analyses
Comparison of duplication sample results

VI. CONCLUSIONS AND RECOMMENDATIONS

Note any contamination found
Identify any suspected source of contamination, if possible
Recommend any further investigative needs

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[SEAL]
Gray Davis
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17 June 2003

ATTACHMENT 4

ITEMS TO BE INCLUDED IN A FEASIBILITY STUDY/REMEDIAL OPTIONS EVALUATION REPORT

The outline below is a minimum requirement for items to be included and discussed in the text of all feasibility studies/remedial option evaluation reports submitted to the Board. Reports must be signed by a registered geologist, certified engineering geologist, or civil engineer registered or certified by the state of California.

I. Purpose of Feasibility Study/Remedial Options Evaluation

II. Background
  A. Description of Facility
  B. Site History
    1. Years of Operation
    2. Chemical Use
    3. Chemical Releases (Potential and Documented)

C. Geology
   1. Regional
   2. Local, soil type, lithology, lateral extent of lithologic units

D. Hydrogeology
   1. Aquifers, Aquitards, Perched Aquifers
   2. Groundwater flow rates, directions, recharge, discharge
   3. Groundwater use
   4. Extraction and injection wells affect on groundwater flow

E. Surface Water
   1. Losing or gaining streams, ponds etc.
   2. Hydraulic connection with aquifers

F. Local Land Use

G. Previous Investigation and Remedial Actions

II. Nature and Extent of Contamination

A. Contaminants in Soils
   1. Types and Concentrations
   2. Lateral and Vertical Extent

B. Pollutants in Groundwater
   1. Types and Concentrations
   2. Lateral and Vertical Extent (including Perched Zones)

III. Contaminant Fate and Transport

A. Contaminant Properties
   1. Mobility
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38 pgs

(20)

No. 06-562

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF LOCKHEED MARTIN CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a party that is a "covered person" under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a), but that does not satisfy the requirements for bringing an action for contribution under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), may bring an action against another covered person for cost recovery under Section 107(a).

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BRIEF OF LOCKHEED MARTIN CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

The question presented in this case is whether a party that is a "covered person" under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a), but is not entitled to bring a contribution action under Section 113(f) of CERCLA, can recover a portion of its response costs from other covered persons through a cost-recovery action under Section 107(a). *Amicus* has a significant interest in the resolution of this question because—consistent with one of CERCLA's principal objectives—it has voluntarily initiated remediation activities at sites throughout the United States. If this Court were to conclude that covered persons may not recover costs under Section 107(a), *amicus* would be forced unjustly and unjustifiably to bear costs that are in large part attributable to other parties, including the United States government. For that reason, Lockheed Martin Corporation has frequently participated as an *amicus curiae* in litigation concerning the right of voluntary remediators to recover costs from other responsible parties under CERCLA. *See, e.g.*, Br. of Lockheed Martin Corporation as *Amicus Curiae* in Support of Respondent, *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004) (No. 02-1192).

Lockheed Martin is one of the world's leading advanced technology and aerospace companies. Approximately eighty-

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

five percent of Lockheed Martin's business is with the United States Department of Defense and various federal agencies. In connection with this work, Lockheed Martin owns or operates a number of facilities that were formerly owned or operated by the federal government. A holding that eliminates a voluntary remediator's right to cost recovery under Section 107(a) could effectively bar Lockheed Martin from recovering any portion of its voluntary cleanup costs at these sites and insulate the federal government from its substantial CERCLA liability. For example, Lockheed Martin has brought suit against the United States under Section 107(a) to recover tens of millions of dollars it expended to remedy the release of hazardous substances from a military production facility that the United States formerly operated in Hempstead, New York. *See Lockheed Martin Corp. v. United States*, No. 06-01438 (D.D.C. filed Aug. 15, 2006). The United States has moved to dismiss the suit on the ground that, as a covered person, Lockheed Martin is not permitted to recover costs under Section 107(a).

If the decision below were reversed, Lockheed Martin and other industry members would be compelled to postpone cleanup activities until they are sued under CERCLA in order to ensure that they could recover a portion of their response costs from other responsible parties—a result that conflicts with CERCLA's goal of promoting the prompt, voluntary remediation of hazardous waste sites.

STATEMENT

Section 107(a) of CERCLA authorizes "the United States Government or a State or an Indian tribe," or "any other person," to recover its hazardous waste cleanup costs from "covered persons" legally responsible for the contamination.[2] 42

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[2] Section 107(a) imposes liability for the payment of response costs on four categories of "covered persons," so denominated by the title of the section. 42 U.S.C. § 9607(a). These categories of covered persons are

U.S.C. § 9607(a)(4)(A), (B). If, as the government argues, covered persons are prohibited from recovering costs under Section 107(a) and are also prohibited from seeking contribution under Section 113(f)(1) without first being sued or settling their liability with the United States or a State, then CERCLA—which Congress intended to be a *comprehensive* statutory framework governing hazardous waste remediation—contains a vast loophole that significantly undermines its remedial efficacy.

1. At its facility in Camden, Arkansas, respondent retrofitted rocket motors under contract with the United States from 1981 to 1986. During the retrofitting process, hazardous substances were released into the environment, causing soil and groundwater contamination at the site. J.A. 23-26. Respondent voluntarily undertook cleanup operations to address these releases, and then filed suit in the Western District of Arkansas to recover a portion of its cleanup costs from the United States. J.A. 29-32. Respondent initially sought recovery under both Sections 107(a) and 113(f)(1) of CERCLA. J.A. 18-19. After this Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), which held that contribution actions under Section 113(f)(1) may be brought only "during or following" a Section 106 or Section 107(a) civil action, respondent dropped its Section

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[Footnote continued from previous page]

commonly referred to as "potentially responsible parties" or "PRPs." Although courts have generally used the terms "covered person" and "PRP" interchangeably, "covered person" is more accurate because it is the term that Congress used in the statute itself. *See Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, 423 F.3d 90, 97 n.8 (2d Cir. 2005) (expressing dissatisfaction with the term PRP because "*any* person is *conceivably* a responsible party under CERCLA," and because "the term may be read to confer on a party that has not been held liable a legal status that it should not bear") (emphases in original), *pet. for cert. pending*, No. 05-1323 (Apr. 14, 2006).

113(f)(1) claim and proceeded solely under Section 107(a). J.A. 34-37.

The government moved to dismiss on the ground that respondent, as a covered person, could not assert a cause of action under Section 107(a). J.A. 38-41. The district court dismissed the suit, relying on then-controlling circuit precedent to conclude that a covered person "cannot rely on Section 107(a) to seek full cost recovery on a theory of joint and several liability from another jointly liable party." Pet. App. 25a.

2. The court of appeals unanimously reversed. The court concluded that *Cooper* had upset the foundations of its earlier precedent precluding covered persons from proceeding under Section 107(a). The court explained that the plain language of Section 107(a) clearly granted a right of recovery to covered persons because the statutory phrase "'any other person' means any person other than the statutorily enumerated 'United States Government or a State or an Indian tribe.'" Pet. App. 14a. Respondent, the court continued, "is such a 'person.'" *Id.* Emphasizing the important role of voluntary cleanups in CERCLA's remedial framework, the court further explained that it could "discern nothing in CERCLA's words, suggesting Congress intended to establish a comprehensive contribution and cost recovery scheme encouraging private cleanup of contaminated sites, while simultaneously excepting—indeed, penalizing—those who voluntarily assume such duties." *Id.* at 17a.

SUMMARY OF ARGUMENT

This case will determine whether CERCLA will remain a *comprehensive* remedial regime for facilitating the prompt, voluntary cleanup of hazardous waste sites and the equitable allocation of cleanup costs among responsible parties, or whether it will effectively collapse under the weight of the loophole that the government self-servingly urges this Court to create. Specifically, the Court's decision will determine

whether private parties will continue to undertake the voluntary remediation of contaminated sites—or will instead be compelled by the absence of a cost-allocation mechanism to postpone cleanup until the initiation of government enforcement actions. The Court's decision will similarly determine whether hundreds of millions of dollars that have already been expended on voluntary cleanups will be allocated among all liable parties—or will instead be borne entirely by those responsible corporate citizens that voluntarily initiated the cleanups.

A. The plain language of Section 107(a) creates a cause of action for covered persons to recover a portion of their response costs from other liable parties. Section 107(a) provides that covered persons "shall be liable for" costs incurred by "the United States Government or a State or an Indian tribe" or "any other person." 42 U.S.C. § 9607(a)(4)(A), (B). The statutory language could not be clearer: The phrase "any other person" in Subsection (a)(4)(B) permits *any* person other than the government entities listed in Subsection (a)(4)(A)—including covered persons that have "incurred" "costs of response"—to recover their costs from any covered person. Read naturally, the term "other" distinguishes between the government entities entitled to sue under Section 107(a)(4)(A)—who are authorized to recover any response costs "not inconsistent with the national contingency plan"—and private persons entitled to sue under Section 107(a)(4)(B)—who are authorized to recover any response costs "consistent with the national contingency plan." Section 107(a) therefore creates a cause of action for "any . . . person" that has expended response costs, while establishing different burdens of proof for government entities and private parties.

This reading of the statutory text is confirmed by the rule of the last antecedent, which provides that a limiting clause—*i.e.*, the "any other person" clause in Subsection (a)(4)(B)—should be read as referring only to the phrase that it immedi-

ately follows—*i.e.*, the list of government entities set forth in Subsection (a)(4)(A)—as well as by this Court's prior interpretations of Section 107(a). *See, e.g., Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21-22 (1989), *overruled on other grounds by Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

B. The government's strained reading of Section 107(a) defies the statute's plain language and several well-established rules of statutory construction. The government contends that the phrase "any other person" refers to—and excludes—covered persons. But the immediate antecedent for that phrase is the list of government entities that have also "incurred" costs—not covered persons generally. None of the cases that the government cites provides support for disregarding the immediate antecedent and instead reading "other" to relate back to the list of covered persons set forth earlier in the statute.

The legislative history to which the government points is equally unavailing. As the government notes, an earlier version of Subsection (a)(4)(B) reported out of committee provided a cause of action to the United States government, States, *and* "any person"—a formulation *that the government concedes "unambiguously" and "unquestionably" encompassed covered persons*. Pet. Br. 19, 23 (emphasis added). The government is wrong, however, to contend that the addition of the term "other," which was not the subject of any congressional debate, radically changed the scope of the statute. The addition was obviously stylistic, and may best be explained by the fact that the statute—contrary to ordinary canons of construction—expressly provides that the United States government and States may be considered "persons." This minor, unremarkable change cannot carry the heavy weight the government places on it.

C. The government further contends that authorizing covered persons to bring suit under Section 107(a) would impair CERCLA's carefully calibrated remedial regime and ef-

fectively render the contribution cause of action created in Section 113(f)(1) superfluous. But the two sections fit together perfectly: Section 107(a) provides covered persons, as well as all other persons, a cause of action to recover "costs of response" that they themselves have "incurred" remediating a site; Section 113(f)(1) creates a derivative contribution claim for persons sued under Section 107(a) to recover a portion of the liability assessed against them.

CERCLA's legislative history confirms that Sections 107(a) and 113(f)(1) provide distinct causes of action for differently situated parties. Indeed, it was firmly established when Congress enacted Section 113(f)(1) in 1986 that Section 107(a) cost-recovery actions *were* available to covered persons to recover "costs of response" they had "incurred" during a voluntary remediation. There was, however, some dispute concerning whether CERCLA, or federal common law, authorized any actions for contribution. There is no indication in the statutory text or legislative history that, in amending CERCLA to add an express cause of action for *contribution*—and thus dispelling the existing ambiguity in favor of the additional remedy—Congress simultaneously intended to eliminate the then well-established right of covered persons to bring suit under Section 107(a) to recover their own response costs.

Under this framework, CERCLA's limitations periods, settlement protection scheme, and liability standards work in harmony to create a comprehensive remedial statute. Indeed, it is the government's reading of Section 107(a) that would undermine the effectiveness of CERCLA's regulatory framework by denying voluntary remediators a cost-recovery mechanism.

D. The government's position would also effectively immunize the United States from its substantial share of CERCLA liability at the many sites now being voluntarily remediated throughout the country. If Section 107(a) were

unavailable to voluntary remediators, they would effectively be unable to recover any of their cleanup costs from the government unless the government first initiated a CERCLA enforcement action against them. In addition to discouraging private parties' voluntary remediation efforts, such a result would contravene CERCLA's explicit directive that the federal government receive the same treatment as all other parties responsible for the discharge of hazardous waste. *See* 42 U.S.C. § 9620(a).

ARGUMENT

SECTION 107(a) OF CERCLA CREATES A CAUSE OF ACTION FOR ANY PERSON WHO INCURS RESPONSE COSTS.

As this Court recognized when construing Section 113(f) in *Cooper*, the interpretation of CERCLA depends "first and foremost" on the statute's text. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 356 (1994); *see also Cooper*, 543 U.S. at 167. That principle is dispositive here because the plain language of Section 107(a) authorizes *any* person who has incurred response costs—including a covered person such as respondent—to seek recovery of those costs from another covered person. Because respondent's suit falls squarely within the scope of Section 107(a), this case should begin—and end—with a straightforward application of the provision's text. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989).

A. The Plain Language Of Section 107(a) Authorizes Cost-Recovery Actions By Covered Persons.

Subparagraphs (1) through (4) of Section 107(a) describe four categories of "covered persons." 42 U.S.C. § 9607(a)(1)-(4). The statute then states that these "covered persons" "shall be liable for"

> (A) all costs of removal or remedial action *incurred by the United States Government or a State or an In-*

> *dian tribe* not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response *incurred by any other person* consistent with the national contingency plan; . . . .

42 U.S.C. § 9607(a)(4)(A)-(B) (emphases added).

Subsections (a)(4)(A) and (a)(4)(B) use parallel structures to create a comprehensive liability framework. The phrase "any other person" in Subsection (a)(4)(B) refers back to the categories of persons—the United States government, or a State, or an Indian tribe—expressly mentioned in Subsection (a)(4)(A) and creates a cause of action for *any* person—including covered persons—not entitled to sue under Subsection (a)(4)(A). *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting *Webster's Third New International Dictionary* 97 (1976)).

This reading of Section 107(a) is confirmed by the rule of the last antecedent, which provides that "a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it *immediately* follows." *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 343 (2005) (internal quotation marks and alteration omitted; emphasis added). In Section 107(a), the phrase "any other person" distinguishes those parties entitled to sue under Subsection (a)(4)(B) from the immediately preceding list of government entities authorized to sue under Subsection (a)(4)(A). Indeed, the version of Section 107(a)(4)(B) initially reported out of a Senate committee in 1980 authorized suits by the United States, States of the Union, *and* "any person"—a formulation that the government concedes reached covered persons. Pet. Br. 19, 23. Because the United States and the States are expressly included within CERCLA's definition of "person" (42 U.S.C. § 9601(21)), the term "other" was most likely added

to clarify the distinction between the statutorily defined persons authorized to sue under Subsection (a)(4)(A)—the United States government or the States—and the persons authorized to sue under Subsection (a)(4)(B). This stylistic revision did not substantively alter the scope of Subsection (a)(4)(B). *See* 126 CONG. REC. 30932 (Nov. 24, 1980) (statement of Sen. Randolph) (discussing amendments to the initial version of CERCLA that "warrant[ed] close scrutiny," and making no mention of the addition of the word "other" to Section 107(a)(4)(B)); *see also infra* 16.

Properly understood, Subsections (a)(4)(A) and (a)(4)(B) create two different classes of plaintiffs. The government entities that possess a cause of action under Subsection (a)(4)(A) can recover any costs "not inconsistent with the national contingency plan"—a set of regulations promulgated by the EPA to implement CERCLA (40 C.F.R. pt. 300)—while "any other person" can bring suit under Subsection (a)(4)(B) to recover costs "consistent with the national contingency plan." Thus, although covered persons are entitled to sue under Subsection (a)(4)(B), they face a higher recovery threshold than government entities bringing suit under Subsection (a)(4)(A) because they bear the burden of establishing that the costs they expended were "consistent with" the national contingency plan.

Indeed, the Court has previously endorsed this plain reading of Section 107(a). In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), *overruled on other grounds by Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court explained that CERCLA "allow[s] private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from the *other* potentially responsible parties." *Id.* at 21-22 (emphasis added). Similarly, in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), the Court confirmed that Section 107(a) "authorizes private parties to recover cleanup costs from *other* PRPs." *Id.* at 818 (emphasis added). Although *Key Tronic*'s discussion

of this issue was termed "dictum" in *Cooper* (543 U.S. at 170), the fact remains that no Justice in *Key Tronic* "expressed the slightest doubt that § 107 indeed did enable a PRP to sue other covered persons for reimbursement." *Id.* at 172 (Ginsburg, J., dissenting).

Moreover, a contrary reading of Section 107(a) would significantly unsettle CERCLA's statutory framework. If covered persons were not entitled to seek recovery under Section 107(a), then even truly innocent landowners, such as bona fide purchasers, who voluntarily remediated hazardous waste on their property would be left without a means of recovering their costs from those parties responsible for the pollution. In order to avoid this result, the government attempts to draw a distinction between "innocent" covered persons, who the government contends are entitled to bring suit under Section 107(a), and "non-innocent" covered persons, who the government excludes from the reach of Section 107(a). *See* Pet. Br. 15-16. But this distinction is found nowhere in the statutory language. CERCLA does not exempt "innocent" parties from the definition of covered persons in Section 107(a)(1)-(4), but rather recognizes certain narrow defenses from liability. *See* 42 U.S.C. §§ 9601(35), 9607(b)(3) (innocent landowner defense); *id.* §§ 9601(40), 9607(r)(1) (bona fide prospective purchasers). These defenses do not remove innocent parties from the broadly worded definitions of covered persons in Section 107(a)(1)-(4).

B. The Government's Reading Of Section 107(a) Is Fundamentally Flawed.

Subsections (a)(4)(A) and (a)(4)(B) create two parallel classes of plaintiffs who have "incurred" response costs: the government entities listed in Subsection (a)(4)(A) and "any other person," as provided in Subsection (a)(4)(B). Given this parallelism, the most straightforward and natural reading of the modifier "other" in the phrase "any other person" distinguishes between the government entities mentioned di-

rectly above in Section 107(a)(4)(A) and those persons—any persons other than those explicitly authorized to sue under Section 107(a)(4)(A)—entitled to sue under Section 107(a)(4)(B). The government, however, asserts that the "other" modifier leapfrogs over the persons referenced in Section 107(a)(4)(A) and the intervening verb phrase—"shall be liable for"—and refers back to the categories of covered persons set forth in Section 107(a)(1)-(4). Pet. Br. 15-16. This convoluted statutory construction not only defies the "clear meaning of the text" (*Cooper*, 543 U.S. at 167), but also violates several interpretive canons—including the canons on which the government purports to rely.

1. In *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345 (1920), the Court determined that the concluding statutory phrase "not domiciled in Porto Rico" should apply to a short integrated list of persons, including "citizens or subjects of a foreign State or States, or citizens of a State, Territory, or District of the United States." *Id.* at 348. Unlike the phrase at issue in *Mor*, which came at the end of "several words" and was clearly applicable to the first as well as the last (*id.*), the phrase "any other person" in Section 107(a)(4)(B) is separated from the covered persons set forth in Section 107(a)(1)-(4) by a verb phrase ("shall be liable for") and by the government entities listed in Section 107(a)(4)(A). Indeed, Section 107(a) is structured in two distinct parts: The first lists those persons who are responsible under the section, and the second sets forth to whom and for what the responsible persons are liable. It is not a simple integrated list of related examples, and it would do violence to the language to read "other" in Subsection (a)(4)(B) to leapfrog back to the four categories of covered persons listed in Section 107(a)(1)-(4).

Jama is no more helpful than *Mor* to the government's position. In *Jama*, the Court rejected the argument that the statutory phrase "another country whose government will accept the alien" applied not only to the "country" immediately

preceding the phrase, but also to countries described in separate, prior subparagraphs. 543 U.S. at 340. Relying upon the rule of the last antecedent, the Court explained that the petitioner's effort to "seize[] upon the word 'another' . . . as a means of importing the acceptance requirement into [other] clauses . . . stretche[d] the modifier too far." *Id.* at 342.

The government is attempting a similar interpretive somersault here by shifting the focus of the phrase "any other person" past its most natural target—the government entities mentioned in Subsection (a)(4)(A)—back to the covered persons mentioned in a more remote part of the statute. The government's attempt to manufacture a connection between "other" and the list of covered persons "stretches the modifier too far" by disregarding the persons listed in Section 107(a)(4)(A).

Moreover, although it is certainly true, as the government asserts, that the terms "both," "other," and "another" are "'just as likely to be words of *differentiation* as they are to be words of connection'" (Pet. Br. 15 (*quoting Jama*, 543 U.S. at 343 n.3)), that point does not support the government's reading of Section 107(a). The term "other" in Subsection 107(a)(4)(B) differentiates between the persons listed in Subsection (a)(4)(A)—the United States government or a State or an Indian tribe—and all "other" persons, including covered persons, entitled to bring a cost-recovery action under Subsection (a)(4)(B). The term does not need to reach all the way back to the list of covered persons to serve a differentiating function. *See, e.g., United States v. Standard Brewery*, 251 U.S. 210, 218 (1920) ("we think it clear that the framers of the statute intentionally used the phrase 'other intoxicating' as relating to and defining the *immediately preceding designation* of beer and wine") (emphasis added).[3]

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[3] Congress's addition of the word "other" to differentiate between the parties entitled to sue under Subsections (a)(4)(A) and (a)(4)(B) was

2. The government also suggests that its reading of Section 107(a) is compelled by the interpretive canon that urges courts to construe statutes "in such fashion that every word has some operative effect." Pet. Br. 20 (internal quotation marks omitted). The government asserts that the word "other" in the phrase "any other person" becomes superfluous if it does not differentiate covered persons from persons entitled to sue under Subsection (a)(4)(B) because the phrase "other necessary costs" already distinguishes parties authorized to sue under Subsections (a)(4)(A) and (a)(4)(B).

The phrase "other necessary *costs*," standing alone, would be an exceedingly odd—and unclear—means of excluding the government *entities* listed in Subsection (a)(4)(A) from bringing suit under Subsection (a)(4)(B). It is far more natural to read the phrase "any other *person*" as performing that function, and to recognize that in referring to "other . . . costs," Congress most likely merely chose to reinforce the distinction between "costs" that may be recovered under Subsection (a)(4)(A)—*i.e.*, those "consistent with the national contingency plan"—and those that may be sought under Subsection (a)(4)(B)—*i.e.*, those "not inconsistent with the national contingency plan."

Indeed, the interpretive canon invoked by the government is typically used to avoid interpretations that would render other statutory sections wholly superfluous, not to prevent Congress from using several different terms to reinforce a statute's meaning. In *Gutierrez v. Ada*, 528 U.S. 250 (2000), the Court warned against overreliance on this canon of construction and explained that "as one rule of construction

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[Footnote continued from previous page]

necessary because the definition of "person" under 42 U.S.C. § 9601(21) explicitly includes the United States and the States. The phrase "any *other* person" clarifies that, although the United States and the States are persons within the meaning of CERCLA, they must seek relief under Subsection (a)(4)(A), rather than Subsection (a)(4)(B).

among many, . . . the rule against redundancy does not necessarily have the strength to turn a tide of good cause to come out the other way." *Id.* at 258. The Court concluded that the phrase "any election" in the statute before it had "some clarifying value," and even though "[t]hat may not be very heavy work for the phrase to perform, . . . a job is a job, and enough to bar the rule against redundancy from disqualifying an otherwise sensible reading." *Id.*

Here, the phrase "any other person" most naturally distinguishes the *persons* entitled to sue under Subsection (a)(4)(A) and Subsection (a)(4)(B). Even assuming arguendo that—standing alone—the phrase "other necessary costs" might conceivably be used to convey the same distinction, it is not the most obvious candidate for doing so where, as here, Congress used language that is far more apposite. Moreover, it would be strange indeed if, as the government contends, the first "other" in Subsection (a)(4)(B) referred back to the costs referenced in Subsection (a)(4)(A), while the second "other" referred not to the government entities set forth in Subsection (a)(4)(A) but to the covered persons listed back in Section 107(a)(1)-(4). The government can muster no precedent or interpretive principle to support such an unintuitive reading of Section 107(a).

3. The government also relies heavily on the fact that the language that became Section 107(a)(4)(B) was modified while the Senate debated the bill. It notes that the phrase in question at one time made covered persons liable "for 'all costs of . . . remedial action incurred by the United States Government or a State, and . . . any other costs incurred *by any person* to remove a hazardous substance.'" Pet. Br. 18-19 (quoting S. 1480, 96th Cong. § 4(a) (as reported Nov. 18, 1980)). Although the government *concedes* that this language "unambiguously" includes covered persons, it contends that "the only plausible explanation" for the subsequent addition of the word "other" before "person" "was that Congress intended to exclude PRPs from bringing suit." *Id.* at 19.

Far from being "the only plausible explanation," the government's reading is implausible in the extreme. Indeed, it seems plain that the word "other" was most likely added before "person" in order to avoid an obvious redundancy: While traditional rules of construction stipulate that the United States and States of the Union generally are not "persons" (*see United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989)), CERCLA expressly reverses that rule and provides that both sovereigns *are* "persons." 42 U.S.C. § 9601(21). The phrase "any person" would thus include both the United States and the States, rendering wholly redundant the express references to both in the preceding clause. A simple stylistic change—placing "other" before "person"—neatly solved that problem without altering the intended, broad meaning.[4]

Significantly, those revisions to Section 107(a) that were intended to have substantive effects were the subject of extensive congressional debate. For example, the legislative history is replete with references to the deletion of the phrase "joint and several liability" between the July 11 and November 18 versions. *See, e.g.*, 126 CONG. REC. 30932 (statement of Sen. Randolph) ("we have deleted any reference to joint and several liability, relying on common law principles to determine when parties should be severally liable"); 126 CONG. REC. 30972 (Nov. 24, 1980) (statement of Sen. Helms). By the government's own admission, the statutory language "unambiguously" permitted actions by covered per-

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[4] Indeed, when the version of Section 107(a) reported on July 11, 1980, which does not include the "other person" formulation, is compared with the November 18 version, which does, a host of revisions are evident, many of which have no apparent substantive import at all. For example, language specifying that covered persons are liable by virtue of a "release" was repositioned from a separate line underneath Section 107(a)(4) and integrated into Section 107(a)(4) itself. Courts have confirmed that this revision had no substantive implications. *See, e.g., New York v. Shore Realty Corp.*, 759 F.2d 1032, 1043 n.16 (2d Cir. 1985).

sons *before* "other" was inserted before "person." Yet there is not a shred of evidence that a single legislator believed the reach of the statute had been drastically curtailed—as now urged by the government—by virtue of that change. In fact, when Senator Randolph, CERCLA's cosponsor in the Senate, reviewed on the Senate floor a list of changes that "warrant[ed] close scrutiny" (126 CONG. REC. 30932), he made no mention of the exclusion of covered persons from the ambit of the cost-recovery cause of action. That deafening silence persuasively belies the government's inventive attempt to pass off a minor stylistic change as a waters-parting event. *See Church of Scientology v. IRS*, 484 U.S. 9, 17-18 (1987).

This Court has made clear that it is incompatible with the realities of the legislative process to ascribe meaning to every modification of statutory language, because numerous revisions having no substantive implications are made both during the initial drafting process and through subsequent amendments. In *Jama*, for example, the Court rejected the argument that a change from "any country" to "another country" worked a "momentous limitation upon executive authority" because there were "numerous changes [between the two versions] that [were] attributable to nothing more than stylistic preference." 543 U.S. at 343 n.3 (emphasis omitted). In the absence of some explanation as to why this revision warranted special attention, the Court was unwilling to read it as anything more than a stylistic change. The holding in *Jama* applies *a fortiori* to mere drafting edits, such as the one on which the government relies here.

C. Allowing Covered Persons To Recover Response Costs Under Section 107(a) Is Consistent With The Overall Structure And Legislative Objectives Of CERCLA.

The government further contends that a decision authorizing covered persons to recover response costs under Section 107(a) would render Section 113(f)(1) superfluous and un-

dermine the settlement protection scheme and other procedural features of CERCLA. But, in so arguing, the government again ignores the plain language of Section 107(a) and the coherent, comprehensive structure of CERCLA's regulatory framework.

1. Sections 107(a) and 113(f)(1) are "distinct" provisions that work together to create a comprehensive regime for the recovery of hazardous waste cleanup costs. *See Cooper*, 543 U.S. at 163 n.3 ("The cost recovery remedy of § 107(a)(4)(B) and the contribution remedy of § 113(f)(1) are similar at a general level in that they both allow private parties to recoup costs from other private parties. But the two remedies are clearly distinct."). Each section addresses private plaintiffs in different positions.

Persons eligible to file suit under Section 107(a) have "incurred" "costs of response" in remediating a hazardous waste site and can use the section's cost-recovery cause of action to recover a portion of those costs from other responsible parties. Persons eligible to seek contribution under Section 113(f)(1) have not themselves expended response costs but have instead been sued under Section 107(a) and can use the contribution cause of action to apportion liability among other covered persons. *See* Pet. Br. 23 (defining "contribution" as "a claim by one party to recover an amount from a jointly liable party after the first party had extinguished a disproportionate share of their common liability") (emphasis omitted). Thus, covered persons cannot simply pick and choose between Sections 107(a) and 113(f)(1) at their whim; they are limited to Section 107(a) when seeking "costs of response" they have "incurred" themselves, and Section 113(f)(1) when seeking contribution for costs for which they have been held liable in a Section 107(a) action.

2. The legislative history of CERCLA, and the congressional objectives that animate the statute, confirm that Sec-

tions 107(a) and 113(f)(1) create causes of action for differently situated parties.

a. Congress enacted CERCLA in 1980 to respond to the significant environmental and public-health hazards posed by industrial pollution. *See United States v. Bestfoods*, 524 U.S. 51, 55 (1998). "The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup." *Id.* at 56 n.1 (internal quotation marks omitted).

Congress designed the remedial provisions of Section 107(a) to promote both government-initiated and voluntary cleanup efforts by the private sector. *See* S. REP. NO. 848, 96th Cong., 2d Sess., at 31 (1980) ("This liability standard is intended to induce potentially liable persons to *voluntarily mitigate damages* rather than simply rely on the government to abate hazards.") (emphasis added).[5] As lower courts have recognized, "[t]his expressed goal of achieving voluntary cleanup is directly enhanced by Congress' including in section 107(a)(4)(B) the ability of responsible persons to recover voluntarily incurred response costs from other responsible persons." *United States v. New Castle County*, 642 F. Supp. 1258, 1264 (D. Del. 1986).

Indeed, in the years immediately following CERCLA's enactment, "[v]arious courts held that § 107(a)(4)(B) . . . authorized . . . a cause of action" between a "private party that had incurred response costs, but that had done so voluntarily and was not itself subject to suit," and "other PRPs." *Cooper*, 543 U.S. at 161-62 (citing *Wickland Oil Terminals v. Asarco,*

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[5] *See also* 126 CONG. REC. 26338 (Sept. 19, 1980) (statement of Rep. Florio) ("[Section 107] accomplishes three objectives. It assures that the costs of chemical poison releases are borne by those responsible for the releases. It creates a strong incentive both for prevention of releases *and voluntary cleanup* of releases by responsible parties.") (emphasis added).

Inc., 792 F.2d 887, 890-92 (9th Cir. 1986); *Walls v. Waste Res. Corp.*, 761 F.2d 311, 317-18 (6th Cir. 1985); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1140-43 (E.D. Pa. 1982)).

The government attempts to sow doubt about the early interpretation of Section 107(a)(4)(B), but is unable to cite a single case decided before the enactment of the Superfund Amendments and Reauthorization Act of 1986 ("SARA") that rejected a covered person's right to recover cleanup costs under Section 107(a). And although the government claims to be "aware of only two federal courts that had unambiguously held that a PRP was entitled to sue another PRP for costs" (Pet. Br. 28), several decisions that the government does not mention also concluded that covered persons had a right of recovery under Section 107(a). *See Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 916 (N.D. Okla. 1987); *City of New York v. Exxon Corp.*, 633 F. Supp. 609, 616-17 (S.D.N.Y. 1986); *Velsicol Chem. Corp. v. Reilly Tar & Chem. Corp.*, 1984 U.S. Dist. LEXIS 24317, at *11 (E.D. Tenn. Aug. 16, 1984); *see also Pinole Point Props., Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 291 (N.D. Cal. 1984) (holding that covered persons can assert a cause of action under Section 107(a) because "any other person" in Section 107(a)(4)(B) "refers to persons other than the state and federal government rather than to persons other than those liable under the Act").

Although an unambiguous and unbroken line of precedent emerged holding that Section 107(a) authorized covered persons to bring suit to recover voluntarily "incurred" "costs of response," CERCLA, as originally enacted, was silent concerning "whether a private entity that had been sued in a cost recovery action (by the Government or by another PRP) could obtain *contribution* from other PRPs." *Cooper*, 543 U.S. at 162 (emphasis added). In light of this Court's decisions limiting the availability of implied contribution rights (*see, e.g., Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451

U.S. 630, 638-47 (1981)), the lower courts were divided as to whether a right to contribution was available under either CERCLA itself or the federal common law. *Compare New Castle County*, 642 F. Supp. at 1261-69, *with United States v. Westinghouse Elec. Corp.*, 1983 WL 160587, at *3-*4 (S.D. Ind. June 29, 1983).

As a result of this uncertainty about the availability of derivative contribution claims, Congress enacted Section 113(f) in the 1986 SARA amendments to "clarif[y] and confirm[] the right of a person held jointly and severally liable under CERCLA" to seek contribution from other covered persons. H.R. REP. NO. 253, 99th Cong., 1st Sess., pt. 1, at 79 (1985). SARA did not modify Section 107(a), and there is absolutely no indication that Congress intended for it to disturb the right of covered persons to recover their cleanup costs through a cost-recovery action under Section 107(a)(4)(B), which had been recognized in decisions such as *Wickland Oil* and *Stepan Chemicals*. *See Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003) (it is a "cardinal rule . . . that repeals by implication are not favored") (internal quotation marks omitted). As this Court has made clear, "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents . . . and that it expected its enactment to be interpreted in conformity with them." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979).

b. With this background in mind, it strains credulity to assert—as the government does—that when codifying the right of covered persons to pursue a contribution action in Section 113(f), Congress simultaneously restricted the right of voluntary remediators to file a cost-recovery action under Section 107(a). The government's argument relies on canons of construction providing that the implications of a statute may be altered by the implications of a later enactment and that a more specific statute takes precedence over a more general one. Pet. Br. 26-27 (citing *United States v. Fausto*,

484 U.S. 439, 453 (1988); *Busic v. United States*, 446 U.S. 398, 406 (1980)). These interpretive tools simply do not support the broad result that the government seeks. They confirm that the enactment of Section 113(f) resolved the uncertainty about the availability of a contribution action under CERCLA—and, at most, that claims that sound in contribution may be pursued solely under Section 113(f) rather than under Section 107(a). They provide no support, however, for the government's reading of Section 107(a), because it was already well-established at the time of Section 113(f)'s enactment that covered persons could seek cost recovery under Section 107(a) and because nothing in the text of Section 113(f) amended Section 107(a) or otherwise restricted the availability of cost-recovery actions.[6]

Moreover, the legislative history indicating that Congress sought to promote negotiated settlements through SARA does not even remotely suggest that Congress—without modifying the language of Section 107(a) in any way—intended to eliminate the right of voluntary remediators to recover their response costs under Section 107(a). Indeed, the government can cite to no explicit statement in SARA's legislative history that indicates that Congress sought to preclude covered persons from recovering voluntary cleanup costs under Section 107(a). To be sure, when Congress enacted SARA, it was attempting to encourage settlements (Pet. Br. 39-40), but it did so as an alternative to lengthy litigation—not as an alternative to voluntary cleanups by private parties. *See* H.R. REP. NO. 253, pt. 1, at 58-59 ("These provisions should encourage

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[6] The government is therefore wrong to take issue with the court of appeals' conclusion that, notwithstanding the right of covered persons to seek cost recovery, Section 113(f) provides the exclusive mechanism for a covered person to recover a portion of the liability assessed against it in a Section 107(a) action. Pet. Br. 22. The interpretive canons on which the government itself relies substantiate the distinction that the court of appeals identified between suits under Sections 107(a) and 113(f).

quicker, more equitable settlements, decrease litigation and thus facilitate cleanups."). In the six years between the enactment of CERCLA and its amendment through SARA, protracted CERCLA litigation had become common because covered persons routinely resisted the EPA's cleanup demands, which compelled the EPA to resort to costly litigation against recalcitrant parties. In SARA, Congress "tried . . . to refocus the intent of the [CERCLA] program back on cleaning up the sites and away from the slow and costly litigation." 131 CONG. REC. 24728 (Sept. 24, 1985) (statement of Sen. Domenici). Despite the government's claim to the contrary, congressional support for voluntary cleanups was unwavering during the consideration of SARA.[7]

The government further suggests that Congress's focus on negotiated settlements during the SARA debate indicates a desire on the part of Congress to place all cleanups under the control and regulation of the EPA. Congress, however, was well aware in 1986 that the EPA was not in any position to assume a more comprehensive oversight role. Indeed, the General Accounting Office had issued numerous reports to Congress regarding the EPA's enforcement of CERCLA. These reports painted a bleak picture of an agency overwhelmed and understaffed, and unable to meet the requirements of CERCLA or the expectations of Congress. *See* Gen. Accounting Office, *Hazardous Waste, Adequacy of EPA Attorney Resource Levels* (GAO/RCED-86-81FS) (1986). Indeed, the House Report accompanying SARA neatly summarizes the situation: "Under the initial leadership of Assistant Administrator Lavelle, the [CERCLA] program was victim-

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[7] *See, e.g.*, H.R. REP. NO. 253, pt. 5, at 58 ("Voluntary cleanups are essential to a successful program."); 131 CONG. REC. 24730 (Sept. 24, 1985) (statement of Sen. Domenici) ("One important component of the realistic strategy must be the encouragement of voluntary cleanup actions or funding without having the President relying on the panoply of administrative and judicial tools available.").

ized by gross mismanagement. . . . [O]ver twenty top-level officials, including the Administrator of the EPA, resigned or were fired from their jobs. Assistant Administrator Lavelle is currently serving a jail term [for lying to Congress]." H.R. REP. NO. 253, pt. 1, at 55.

Any concern about the quality of voluntary cleanups was addressed not by precluding voluntary remediators from recovering response costs under Section 107(a) but by limiting recovery to those costs that are consistent with the cleanup standards set forth in the national contingency plan. Indeed, courts routinely review the cleanups underlying Section 107(a) claims to ensure that this requirement is met. *See, e.g., Carson Harbor Vill. v. County of Los Angeles*, 433 F.3d 1260 (9th Cir. 2006) (denying a Section 107(a) claim because the cleanup violated the public comment requirement in the national contingency plan). Voluntary remediators are discouraged from performing unsafe, unnecessary, or inadequate cleanups because they will be unable to recover their costs from other responsible parties if they cannot establish that the costs were "necessary" and "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B).[8]

3. The plain language and legislative history therefore establish that Sections 107(a) and 113(f) create distinct, non-overlapping causes of action. Covered persons can sue under Section 107(a) to recover "costs of response" that they have

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[8] The government cites an isolated report in the *Federal Register* issued three years before SARA's enactment as evidence that the EPA "disfavored" private party cleanups and sought to restrict the ability of voluntary remediators to sue under Section 107(a). *See* Pet. Br. 40 (citing 48 Fed. Reg. 40661 (1983)). But the significance of the report is not that the EPA discouraged voluntary cleanups, but that it could not vouch for the quality of sites with which it had no involvement. Indeed, the EPA explicitly stated in the document that it did "not intend[] to preclude responsible parties from taking voluntary response actions outside of a consent agreement." 48 Fed. Reg. at 40661.

"incurred" themselves; they can seek contribution under Section 113(f)(1) for liability to another covered person incurred during a Section 107(a) action. This distinction alleviates all of the potential structural concerns raised by the government.

Statute of Limitations: Permitting covered persons to sue under Section 107(a) does not facilitate evasion of the statute of limitations for suits under Section 113(f)(1). A person who has incurred response costs can seek recovery of those costs under Section 107(a) in accordance with the six-year statute of limitations established by Section 113(g)(2). *See* 42 U.S.C. § 9613(g)(2). The defendant in that action may maintain a separate Section 113(f)(1) action against other covered persons named in the initial action, other covered persons that have not been named, or against the original plaintiff. Any such derivative contribution action must be filed within three years of a judgment or settlement in the original action. *See id.* § 9613(g)(3). Because the nature of the underlying claim determines whether Section 107(a) or Section 113(f)(1) applies, it is impossible for a person that is outside the three-year statute of limitations for Section 113(f)(1) contribution actions to take advantage of the six-year limitations period for Section 107(a) actions. If a covered person has been sued for response costs expended by another person, the only claim available to it is a derivative contribution action under Section 113(f)(1), which is subject to a three-year limitations period. Covered persons thus do not have a choice between limitations periods.

The Contribution Protection Scheme: The government's contention that Section 107(a) actions by voluntary remediators would eviscerate CERCLA's contribution protection scheme for parties that settle with the government is equally unavailing. The contribution protection afforded by Section 113(f)(2) applies to settlements with the United States or a State, and only covers "matters addressed in the" government settlement. 42 U.S.C. § 9613(f)(2). The scope of settlement protection therefore does not, as the government represents,

extend to cleanup costs incurred by private persons. *See, e.g., Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 766 n.7 (7th Cir. 1994) (permitting a nonsettling covered person to assert a claim against a settling covered person "because the decree defines 'covered matters' only in terms of claims available to the United States and the State of Indiana, [and] claims that [the nonsettling covered person] might have based on its own work would seem by definition excluded") (emphases omitted).

If the United States sues to recover its costs against multiple defendants, the availability of contribution protection encourages the defendants in that suit to settle with the United States because a settling party will not be subject to contribution actions under Section 113(f)(1) by other defendants seeking to recover a portion of the government's costs for which they have been held liable. Moreover, these nonsettling defendants would not be able to sue the settling defendant under Section 107(a) for the matters addressed in the settlement because they would not themselves have incurred the response costs in question; those costs would instead have been incurred by the government during its cleanup efforts. But a nonsettling covered person could bring a Section 107(a) action to recover a portion of its own cleanup costs from the settling defendant because those costs would not be "matters covered" by the settlement. *See Akzo*, 30 F.3d at 767.

Because a nonsettling covered person's suit for costs incurred by the government would, by definition, be a derivative claim under Section 113(f)(1), a covered person could not simply "choose" to file a Section 107(a) action to circumvent the settlement protection scheme.[9]

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[9] Take, for example, the situation of Alpha Corp., which incurs $50,000 in response costs investigating groundwater in the vicinity of its facility and then stops work after determining that the contamination was not released from its facility. The federal government then spends $1 million to investigate and initiate a remedial action, and sues Alpha, as well as Bravo

Equitable Apportionment of Response Costs: The government also argues that authorizing covered persons to bring suit under Section 107(a) would result in the inequitable apportionment of costs because of the availability of joint and several liability in Section 107(a). But the defendants in a Section 107(a) action are free to assert contribution claims against the original plaintiff under Section 113(f)(1). The court would then be in a position to "allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). Moreover, there is nothing in the text of Section 107(a) that mandates application of joint and several liability. A provision that would have required joint and several liability was deleted from the statute during the drafting process. *See United States v. Wade*, 577 F. Supp. 1326, 1337 (E.D. Pa. 1983) (deletion of the "reference to joint and several liability was intended to avoid mandatory application of that standard to a situation where it would produce inequitable results"). In-

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Corp., Charlie Corp., and Delta Corp., under Section 107(a) to recover its response costs. The government enters into a settlement with Alpha for $100,000 and with Bravo for $200,000. Alpha then seeks to recover all of its costs from the other covered persons because it believes that it is not liable for any of the releases in question. Alpha cannot seek recovery of the $100,000 from Bravo under Section 113(f)(1) because Bravo has contribution protection for the government's costs. Alpha also cannot seek recovery of the $100,000 from Bravo under Section 107(a) because it has not incurred these response costs itself—the government has. Bravo is therefore fully protected under the terms of the statute. Alpha *can* seek contribution under Section 113(f)(1) for the $100,000 that it paid to the government from Charlie and Delta because they have not settled with the government. Moreover, the settlement protection does not prohibit Alpha from seeking recovery of the $50,000 in response costs against all other covered persons, including Bravo, pursuant to Section 107(a), because Bravo's contribution protection extends only to matters addressed in the settlement with the government—*i.e.*, the government's own cleanup costs.

deed, several courts that addressed the apportionment of liability in Section 107(a) actions prior to adoption of Section 113(f)(1) endorsed an equitable allocation of response costs among covered persons. *See, e.g., New York v. Shore Realty Corp.*, 648 F. Supp. 255, 259 (E.D.N.Y. 1986); *Wehner v. Syntax Agribusiness, Inc.*, 616 F. Supp. 27 (E.D. Mo. 1985).

Ultimately, it is ironic that the government is relying on the specter of the inequitable allocation of response costs to support depriving voluntary remediators of a right to recovery under CERCLA. Nothing could be more inequitable than leaving a responsible corporate citizen that has voluntarily undertaken remedial action to bear cleanup costs for which other parties may be at least partially liable. CERCLA's text and structure give no indication that Congress intended such an inequitable—and nonsensical—result.

D. The Decision Below Creates A Loophole That Enables The United States To Escape CERCLA Liability.

The government's interpretation of Section 107(a) should be rejected for the additional reason that it creates a loophole that could effectively shield the United States from CERCLA liability and thereby significantly undermine the statute's ability to promote prompt hazardous waste cleanups and the equitable allocation of response costs.

1. The federal government is itself a covered person at numerous sites throughout the country. Indeed, 157 of the 1,244 sites on the CERCLA National Priorities List—a list of the most-contaminated sites in the Nation—are federal facilities currently or formerly owned by the United States.[10] If covered persons are prohibited from asserting cost-recovery actions under Section 107(a), the federal government would

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[10] The United States faced $305 *billion* in environmental liabilities at the end of fiscal year 2006. *See* U.S. Dep't of the Treasury, *Financial Report of the United States Government* (2006).

effectively be given a veto over the right of other covered persons to recover cleanup costs from it. At any site at which the federal government is a covered person, no private party would be authorized to initiate a contribution claim against it in the absence of a CERCLA enforcement action brought by the federal government or a State. Because it is rare for state regulators to file suit under CERCLA, rather than relying upon state-law remedies, such a rule would effectively hand the federal government the keys to its own CERCLA liability and afford the government the power to avoid liability by declining to initiate enforcement actions. This result is wholly inconsistent with Congress's clear intention that the United States be treated just like a private party under CERCLA. *See* 42 U.S.C. § 9620(a) ("Each department, agency, and instrumentality of the United States . . . shall be subject to . . . this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this Act.").

2. Indeed, the federal government has consciously pursued a litigation strategy in which it has advocated conflicting legal theories in an apparent effort to minimize its exposure under CERCLA. The government has previously represented to this Court that the "any other person" formulation in Section 107(a) encompasses covered persons. *See* Br. for the United States as *Amicus Curiae* Supporting Petitioner at 20-21, *Cooper* (No. 02-1192) ("Section 107(a)(1)-(4)(B)'s reference to 'any person' is broad enough to allow one jointly liable party to sue another for the former's response costs"). Without a word of explanation for its shifting litigation position, the government now contends that CERCLA provides *no* remedial rights for voluntary remediators.

The government's inconsistent arguments regarding the ability of covered persons to pursue cost-recovery actions represent only one example of its ever-shifting interpretations of CERCLA. In *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998), for example, the

government argued that Section 107(a) cost-recovery actions cannot be brought by covered persons because contribution claims are available to such parties under Section 113(f)(1). *See* U.S. Br. at 28, *Centerior* (No. 97-3163). Having successfully persuaded several circuits to hold that covered persons cannot pursue Section 107(a) cost-recovery actions by emphasizing the availability of Section 113(f)(1) contribution claims, the government then turned around in *Cooper* and argued that covered persons may not recover voluntarily incurred cleanup costs through the very contribution mechanism that it had previously endorsed before the lower courts.

If the Court agrees with the government in this dispute, it will have effectively immunized the United States from CERCLA liability, at the expense of the environment and private industry. Any interpretation of CERCLA that creates a loophole by which the federal government might escape a portion of its extensive environmental liability seriously undermines CERCLA's objectives of remediating hazardous waste and fairly allocating cleanup costs.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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April 5, 2007

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No. 06-562

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*

The Metropolitan Water Reclamation District of Greater Chicago ("MWRD" or "*Amicus*") is one of the largest unified metropolitan sewerage and storm water control districts in the world.[1] It is a special purpose district that is a body corporate and politic and a unit of local government under Illinois law, principally as set forth in the Metropolitan Water Reclamation District Act, 70 ILCS 2605. It is governed by an elected Board of Commissioners.

With a budget for 2007 of approximately $1 billion, MWRD collects and treats wastewater from more than five million people and the industrial equivalent of an additional 4.5 million people in Cook County, Illinois. There are 129 municipalities and 30 townships within its territorial boundaries, including the City of Chicago. MWRD also provides stormwater management for all of Cook County. MWRD exercises regulatory control of discharges from industry and residential properties to its sewers and treatment system, imposes fees for use of the system, levies and collects taxes for its operations and maintenance, and may issue bonds for capital improvements needed for its operational purposes. It has the power of eminent domain.

MWRD is also the owner of more than twenty-five thousand acres of land, much of it lying along the banks of

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[1] *Amicus* respectfully submits that, as a local government entity, it is "similar" to those listed in Supreme Court Rule 37.4 and is thus permitted to file this brief without consent. However, out of courtesy and precaution, pursuant to Supreme Court Rule 37.3, *Amicus* also has obtained consent of the parties. Their letters of consent to this filing are being submitted to the Clerk of this Court simultaneously with this brief. Pursuant to Supreme Court Rule 37.6, *Amicus* avers that no counsel for a party has authored this brief in whole or in part, and that no person or entity other than the *Amicus* or its counsel has made a monetary contribution to the preparation or submission of this brief.

waterways devoted to commerce and stormwater control. This land presents various environmental issues for MWRD. Some of it is used by MWRD, but uses of other MWRD-owned land range from parks, recreation and education to heavy industry. Over fifteen hundred acres owned by MWRD are leased to business and industry. In recent decades, standards for good environmental management have increasingly been incorporated in lease terms, but in some old leases still in effect the language and terms, while favorable to MWRD, are not fully satisfactory to assure that a tenant will be absolutely and fully responsive to environmental issues. Moreover, sometimes tenants can become financially unable to absorb the cost of clean-up. Third parties may contaminate its properties, as well.

When environmental contamination of any of its property occurs due to acts of others and there is either no tenant or no responsive or financially responsible tenant, any cleanup conducted by MWRD would require the expenditure of public funds. If MWRD cannot recoup those funds from an actively responsible party, the taxpaying public either pays the bill, or MWRD and the public are left with a blighted and sometimes vacated parcel.

MWRD has a very real and continuing interest in having the right to cost recovery under Section 107 of the Comprehensive Environmental Response and Liability Act (CERCLA), 42 U.S.C. §9607. Without such rights it may be unable to recover public funds it expends to clean up contaminated properties it owns or controls from the persons or parties that were directly responsible for the contamination. In addition, in *Metropolitan Water Reclamation District of Greater Chicago v. North American Galvanizing and Coatings, Inc.*, 473 F.3d 824 (7th Cir. 2007), the United States Court of Appeals for the Seventh Circuit recently ruled in MWRD's favor on essentially the same question presented in this case. The Seventh Circuit found that Section 107 provides this important cost recovery right to parties that voluntarily incur response costs.

SUMMARY OF ARGUMENT

Your *Amicus* and numerous other special purpose local government agencies own land that can become contaminated by acts of others. They have a real need for a right to recover the public monies they may spend to clean up these properties from those who actively polluted them. Unless a right to cost recovery is available, innocent taxpayers will wind up footing the cleanup bill on the many acres owned by public agencies that are deemed by the statute to be in the class of so-called "potentially responsible parties," or "PRPs."

The interpretation of Section 107 of CERCLA that the United States advances in favor of excluding "potentially responsible parties" from ability to gain cost recovery for clean-ups they undertake is contrary to the statute and serves no worthy public purpose. Denial of a cost recovery right to private and public PRPs who volunteer will decrease the number of properties that are properly addressed by remediation, and the concept that the "polluter pays" will not operate against non-volunteers except where there is a case of direct enforcement by the States or the United States.

The plain language of Section 107 creates a right of action for all "other persons" beyond the United States or a State, and supports no exclusion of entities like MWRD. The United States' interpretation of the language of Section 107 of CERCLA deserves no judicial deference. Moreover, it is ungrammatical and contrary to the express provisions and the remedial purposes of the law.

ARGUMENT

I. THE METROPOLITAN WATER RECLAMATION DISTRICT AND A HOST OF OTHER UNITS OF LOCAL GOVERNMENT NATIONALLY HAVE A SERIOUS NEED FOR COST RECOVERY RIGHTS.

A. Cost recovery rights will enhance the abilities of a myriad of special purpose agencies and districts in the United States that own contaminated property to clean up that property and reduce the burden on innocent taxpayers and site users.

There are thousands of publicly owned wastewater agencies like MWRD in this country. Each is charged with the collection, treatment, reclamation and discharge of wastewaters from residential, commercial and industrial sources throughout their respective jurisdictions. Roughly 200 million people, or 67 per cent of this country's population, are served by publicly owned treatment works. Their operations are financed by taxes, fees, federal government loans and bonds. As a rule, these agencies are hard-pressed to meet the demands for wastewater reclamation service. They are challenged by aging infrastructure, increasing regulatory requirements, security concerns (such as for chlorine tanks and storage) and population growth. Generally they are "under funded."[2]

In addition to wastewater agencies like MWRD, numerous other special purpose agencies of local government exist nationwide that cannot readily divest themselves of environmentally troubled properties. Included among such agencies that generally own real estate are airport authorities, port districts, exposition authorities, highway authorities, school districts, park districts, and public transit

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[2] See GAO REPORT TO THE CHAIRMAN, COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, U.S. SENATE: "SECURING WASTEWATER FACILITIES," GAO-06-390 (p.5).

agencies. Many own properties that are used or occupied by parties other than the agency, and those parties can cause hazardous substances to be released in almost any way imaginable. Since by mere fact of "ownership" these agencies become "potentially responsible parties," they would be barred absolutely from relief under Section 107 if the United States' position in this case were to be accepted. In turn, unless they seek to have themselves sued by or otherwise resolve their liability with the United States or their state government, they would not even have a "contribution" remedy under CERCLA Section 113, 42 U.S.C. § 9613.

All of these agencies need cost recovery rights. The need for a claim for cost recovery under Section 107 arises for special purpose agencies in the obvious scenario where, as in the case recently decided by the Seventh Circuit in favor of your *Amicus*, there is a release of hazardous substances by a person other than the agency to lands owned by the agency. For wastewater agencies, there is the additional danger that unpermitted hazardous substances could be released into their collection systems, resulting in damage to their equipment and real property. While there may indeed be other common law and statutory remedies available to a specific plaintiff in a given situation, the ability to expend public funds and then get recovery from a "responsible party" would at least be useful, and in some cases may be the only way to get cleanup accomplished and obtain appropriate compensation.

While not every case or situation will present a financially capable defendant available and demonstrably "responsible," the reach of CERCLA responsibility extends beyond tenants or operators *per se* and includes (for example) a parent company whose "veil" may be pierced if shown to have abused the corporate form or that actively directs or causes polluting activities, (*Cf. United States v. Bestfoods*, 524 U.S. 51, 55 (1998)), as well as so-called "arrangers" of

hazardous substance releases, such as companies that contracted for chemical formulation or repackaging at a site. *Cf. United States v. Hercules, Inc.*, 247 F.3d 706 (8th Cir.), *cert. denied*, 534 U.S. 1065 (2001); *Jones-Hamilton Co. v. Beazer Materials & Services, Inc.* 973 F.2d 688 (9th Cir. 1992). CERCLA cost recovery would also enable agencies like MWRD to sue those of its customers or midnight dumpers who release hazardous substances in unpermitted amounts into the MWRD collection system, where the release would cause broader environmental damage. Preserving this critical "reach" in the form of cost recovery rights for "private" parties, and especially tax-funded ones, could often determine whether a given site will be cleaned up anytime soon, if at all.

Public PRPs are spending the dollars of innocent taxpayers or site users whose fees are supposed to obtain public services. Unless public agencies have a cost recovery right, the burden of remediating dangerous sites will fall on innocent taxpayers or customers uninvolved with the pollution of those sites, the very group of persons that the Congress sought to free of liability on the principle of "the polluter pays." Thus the "equities" favor indemnity of such voluntary expenditures.

If accepted by the Court, the United States' reading of CERCLA would discourage voluntary responses and greatly reduce the number of instances in which "the polluter pays." The United States' position will greatly inhibit private cleanup generally and reduce the likelihood that polluters will pay for their actions, because the United States and the States generally use enforcement effort only at the most egregious sites.

B. CERCLA's "Brownfield" reclamation programs, while helpful to the economy and environment generally, do not supplant or assuage the need for "cost recovery" rights for agencies owning contaminated land.

In 2002, President Bush signed into law the Small Business Liability Relief and Brownfields Revitalization Act (P.L. 107-118). It amended CERCLA by expanding EPA's so-called "Brownfields" program, boosted funding for assessment and cleanup, enhanced roles for State and Tribal response programs, and clarified Superfund liability. A "Brownfield" property is "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."[3]

As salutary as these revisions to CERCLA are, the "Catch 22" is that public agencies and others that already own troubled sites are *ipso facto* "potentially responsible parties" that cannot participate in the "Brownfields" grant process. Additionally, if a site has had operations on it that were subject to hazardous waste permits under the Resource Conservation and Recovery Act, or to certain Clean Air Act, Clean Water Act, or Toxic Substances Act permits, the site is ineligible.[4] The revised and expanded "Brownfields" programs thus miss an entire universe of PRPs, both public and private, by making them ineligible for grants or *bona fide* purchaser status. *See, e.g.*, 42 U.S.C. §9601(40).

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[3] See brochure published by EPA: THE NEW BROWNFIELDS LAW (October 2002), EPA 500-F-02-134 (http://www.epa.gov/brownfields/pdf/bflawbrochure.pdf).

[4] See 42 U.S.C. §9601(39)(B), CERCLA Section 101(39)(B); see also *Update: Federal Legislation* at p. xxxv-liii, in BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY (T. Davis ed. 2002), American Bar Association (ISBN 1-57073-961-7).

EPA has published guidance making this ineligibility clear. For example, it has advised grant applicants that:

> No part of a grant or loan can be used to pay response costs at a brownfield site for which the recipient of the grant or loan is potentially liable under CERCLA §107. *This means that applicants are not eligible for grants or loans at sites for which they are liable parties under CERCLA.* Under CERCLA § 107, current owners and operators of a facility, owners and operators of a facility at the time of disposal of a hazardous substance, parties that arranged for the treatment or disposal of hazardous substances, and parties that accepted hazardous substances for transport to disposal or treatment facilities are potentially liable for cleanup or paying the cost of cleaning up a site. Thus, an owner of contaminated land may be liable under CERCLA § 107 even though he/she did not cause or contribute to the contamination at the site.[5]

Thus, despite the adoption since the original enactment of CERCLA of generally beneficial programs that will shield new investors from liability (if they agree to a rigorous property cleanup), there is no relief for the existing landowner that voluntarily or involuntarily continues to own property contaminated by others.

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[5] EPA: PROPOSAL GUIDELINES FOR BROWNFIELDS ASSESSMENT, REVOLVING LOAN FUND, AND CLEANUP GRANTS (http://www.epa.gov/oswer/docs/grants/epa-oswer-obcr-07-01.pdf) (emphasis added).

II. DENIAL OF A COST RECOVERY RIGHT TO PRPS THAT VOLUNTARILY INCUR RESPONSE COSTS WOULD PERPETUATE ENVIRONMENTAL PROBLEMS AND SERVES NO WORTHY PUBLIC OR GOVERNMENTAL PURPOSE.

A. Giving the United States and the States the exclusive power to control and approve the remediation of hazardous substance contamination unwisely and unnecessarily increases government power over a huge amount of troubled real estate nationwide.

Inherent in the United States' argument is the sense that the only good cleanup is a government-supervised one.[6] If this position is accepted by this Court, the result will be an effective power grab utterly unintended by any language of the law. Because the possibility of enforcement action by the State or the United States against a contaminated property always exists, acceptance of the United States' position would effectively place a sort of tacit lien or question mark on thousands of acres of polluted real estate around the United States that could then only be cured by a governmental agency review and *imprimatur*. Indeed one almost gets the sense from the United States that persons rendered "potentially responsible parties" by the historic fact of passage of CERCLA are considered to be untrustworthy to undertake honest remediation work.

The United States does not really address the effect of its position on the private marketplace in its brief. It is difficult, indeed, to understand why the United States should care that an independent private right of action exists. The result of this Court's adopting the United States' position respecting the meaning of sections 107 and 113 would generally be to remove from the federal courts the

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[6] *See, e.g.*, negative reference to "unsupervised" cleanup, *Br. for United States* at 13.

jurisdiction and authority to hear and determine CERCLA suits for cost recovery by or contribution among private PRPs for the polluted condition of a site or facility, except in those relatively rare cases when that the United States, a State, an Indian Tribe, or a party not classifiable as a PRP gets actively involved with a site. Since a category of such plaintiffs that cannot be deemed PRPs is more to be wished for than real, only the highest priority sites are likely to be chosen by government regulators for future CERCLA remediation and enforcement.

Such a result would not only discourage voluntary proactive cleanups; it would also mean that many polluters will not be brought to court and forced to pay for the mess they have made. The result of the United States' reading would be that, in general, either a landowner finds it worthwhile to clean up a site at its own expense or the site sits in polluted condition, often unused, for years. Some landowners, would, no doubt, try to interest the EPA in pursuing PRPs other than themselves, but absent a critical public health threat at a given site, the likelihood of success in such an effort is small given the United States' limited resources for this program.[7]

Limiting claims to the circumstances described in Section 113(f), as the United States urges (*Br. for United States* at 26-32), will undercut CERCLA's essential purposes. PRPs would be motivated to wait until they have been sued, or

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[7] "Superfund faces constraints" is one of several statements that the EPA has published on its official Web Site concerning the Superfund program it conducts. "In Fiscal Year 2005, 50 percent of Superfund obligations for construction and post-construction activities went to 11 sites. . . . Due to EPA's priority to fund ongoing work, less funding was available for new construction projects, and EPA did not have enough resources to fund 9 new construction projects evaluated by the National Priority Panel and that were ready for construction." URL: http://www.epa.gov/superfund/action/process/numbers05.htm.

until they are able to negotiate a Section 113(f)(3)(B) settlement with the government (assuming they will ever be able to do so), before undertaking cleanup. Most importantly, PRPs at the vast majority of contaminated sites where there is no governmental suit or settlement will escape having to pay anything because there will no longer be a CERCLA mechanism to provide cost recovery to plaintiff PRPs who want to do the right thing and clean up.[8] The effect of this disincentive will be profound; of the hundreds of thousands of sites that are deemed contaminated, fewer than 1,300 are currently on the National Priorities list, and only around 300 have been addressed and removed from the list since the enactment of CERCLA over twenty-five years ago.[9]

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[8] As stated in the 2002 Senate Report on the so-called Brownfields amendments to CERCLA:

> "The vast majority of contaminated sites across the Nation will not be cleaned up by the Superfund program ..... [W]hile there are an estimated 450,000 brownfield sites, there are fewer than 1,300 NPL sites."

S. REP. 107-2, S. Rep. No. 2, 107th Cong., 1st Sess. 2001, at 15, 2001 WL 254419.

[9] USEPA's Web Site on the National Priorities List declares "1243 Sites as of March 20, 2007." FINAL NATIONAL PRIORITIES LIST (NPL) SITES—BY STATE (March 2007) (http://www.epa.gov/superfund/sites/query/queryhtm/nplfin.htm). According to EPA: "As of December 2005, construction work was complete at 966 or 62% of Superfund private and federal sites, and work was underway at an additional 422 sites." SUPERFUND'S 25TH ANNIVERSARY: CAPTURING THE PAST, CHARTING THE FUTURE (http://www.epa.gov/superfund/25anniversary/index.htm).

B. Sections 107 and 113 define different causes of action with differing sets of elements that a successful plaintiff must prove.

"Contribution" and "cost recovery" under CERCLA are in fact distinct causes of actions with different elements. Both Section 107 and Section 113 plaintiffs do have to prove the existence of a "facility" at which "hazardous substances" were released that create a harm or threat of harm, and that the defendant is responsible for the release and harm. The identity of the two causes of action ends there, however. A Section 107 plaintiff must also allege and prove that 1) it has made an expenditure that is an environmental response or remedial expenditure, and 2) that the expenditure and the action it paid for were "consistent with" the National Oil and Hazardous Substances Pollution Contingency Plan, 42 CFR, Subchapter J, Part 300 (known as the "National Contingency Plan" or "NCP"). But a Section 113 plaintiff need not make or prove *any* past expenditure whatsoever, much less any conformity with the NCP. Instead, it must prove 1) that it is either a qualified plaintiff, having either been sued or been the subject of an order, or that it has settled or otherwise resolved its liability to the United States or a State per Section 113(f), and 2) that it has incurred or will thereby incurred an obligation in excess of its equitable share if defendant is not made to contribute. Thus the issue of NCP "consistency" does not arise at all in a Section 113 case. Indeed, since the United States and the States bear the easier burden of showing only that their expenditures were "not inconsistent" with the NCP, it is possible for a Section 113 plaintiff to establish a defendant's liability for funds that were not expended strictly "by the book" in accordance with the NCP.

Given that the entire tort law premise of a contribution claim is that the party plaintiff seeking contribution has satisfied an obligation that is jointly an obligation of the party defendant, Section 107 rights cannot be equated to

"contribution" claims.[10] In the present case, the existence of the Plaintiff's obligation in fact and law to a state or to the United States is a mere surmise or assumption in the absence of either a section 107 judgment, a section 106 order, or eligible Section 113 settlement. It is not a judicially or administratively determined fact or legal liability. *Cf. Consolidated Edison Co. of New York v. UGI Utilities, Inc.*, 423 F.3d 90, 98 (n.8) (2d Cir. 2005); and also the Eighth Circuit in its opinion in this case (*Atlantic Research Corp. v. United States*, 459 F.3d 827, 831 (8th Cir. 2006), cert. granted, 127 S.Ct. 1144 (2007)).

C. Any suggestion that voluntary cleanups are somehow "unsupervised" and therefore less worthy or suspect is contrary to actual practice.

One might infer from the United States' Opening Brief that privately conducted remedial actions may generally be of poorer quality than those conducted under United States or state supervision. This notion smacks of arrogance and does not recognize what is required of a plaintiff to succeed in proving that its actions have been "consistent with the National Contingency Plan" under CERCLA Section 107(a) and 42 CFR § 300.700(c)(3). In actual practice, the requirement of consistency with the NCP mandates a sophisticated process that involves employment of well-qualified engineers, provision of both notice and opportunity for comment and, quite commonly, state agency review.

The NCP is no shrinking violet of a regulation. It fills 276 pages of the Code of Federal Regulations.[11] Its robust and

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[10] See RESTATEMENT (SECOND) OF TORTS, Section 886(A); accord *Metropolitan Water Reclamation District v. North American Galvanizing & Coatings*, 473 F3d 824, 836 n. 17 (7th Cir. 2007).

[11] The complete NCP text is available at:

(continued...)

serious nature is obvious from both its length and its detailed requirements respecting the process of carrying out a remedial action. The process a person seeking cost recovery must follow includes, *e.g.*, providing notice and the opportunity for comment at all critical stages of work, *see* 42 CFR § 300.700(c)(6), a remedial investigation that meets minimum standards and a feasibility study that compares various remedial options, *see* 42 CFR §§ 300.430 and 300.700(c)(4), compliance with all "applicable or relevant and appropriate regulations" (so-called "ARARs"), *see, e.g.*, 42 CFR § 300.430(e)(9)(iii)(B),[12] and the presentation of result data that satisfies extensive standards, *see* 42 CFR § 300.915.

As a practical matter, a great many private clean-ups are now being conducted under so-called "voluntary remediation" programs run by the States. These programs incorporate the key scientific and engineering elements of the NCP. This process of state review began under some state laws well over two decades ago, but its importance and use was increased by the amendments to CERCLA in 2002, which provided a degree of protection from enforcement to parties and sites that are enrolled in the state programs. Together with the adoption of risk-based assessment of alternatives and remediation goals, these programs offer promise of practical and relatively cost-effective cleanup approaches for landowners addressing their self-made problems and for "Brownfield" developers.[13]

(...continued)
http://www.epa.gov/oilspill/pdfs/40cfr300.pdf.

[12] See USEPA public explanation of ARARS at http://www.epa.gov/superfund/action/guidance/remedy/arars.htm. "ARARs are identified on a site-by-site basis for all on-site response actions where CERCLA authority is the basis for cleanup."

[13] A full explication of the NCP process and the State Voluntary
(continued...)

The state programs are available irrespective of whether "cost recovery" is going to be sought, and they do not themselves provide for "cost recovery." However, they are an excellent practical means of helping a Section 107 Plaintiff assure itself and the Court that its approach to a site is "consistent with the NCP," because they generally contain the needed elements of the NCP analysis and provide means of ratification of otherwise private engineering effort.

D. It would be folly to suppose that many prospective "innocent" Section 107 plaintiffs exist that will expend a lot of money on cleanups without a vested interest in a given property, such as the interests possessed by an owner.

The average CERCLA site cleanup cost as reported by GAO exceeded $26 million a decade ago.[14] This amount, which likely understates current costs, is hardly going to be collected by a typical local civic group. While there may be a community-minded organization or an environmentally conscious group here and there that has the willingness and capability to fund a given cleanup costing hundreds of thousands, if not millions, of dollars, such groups are pretty scarce. But the party with the most obvious vested interest in a property is the owner. In practice, landowners that have been involved in CERCLA actions brought by the government are generally not allocated more than a minor

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(...continued)
Cleanup programs would take too much text and time away from the issues before the Court. However, an excellent and pretty comprehensive study of the state programs is published in BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY (T. Davis ed. 2002), American Bar Association (ISBN 1-57073-961-7).

[14] GAO REPORT, SUPERFUND: BARRIERS TO BROWNFIELD REDEVELOPMENT, GAO/RCED-96-125, at p. 3.

percentage of responsibility compared to active polluters. And, although there is no hard and fast rule, anecdotal experience with CERCLA cases over the last three or so decades suggests that, as a rule, landowners that are passive and do not reap significant economic benefits from the polluting activity are generally allocated a minority share of the cost of cleanup.[15] This is true for a number of reasons, but the basic reason is that it is an equitable result. As the Seventh Circuit has observed, "polluters differ in the blameworthiness of the decisions or omissions that led to the pollution, and blameworthiness is relevant to an equitable allocation of joint costs." *Browning Ferris Ind. of Ill., Inc. v. Ter Maat,* 195 F.3rd 953, 959 (7th Cir.1999), *cert. denied*, 529 U.S. 1098 (2000).

By contrast, where owners are significant actors and causes of the problem, they will get hit with as much as the entire allocation. In any event, the inherent equitable power of the trial court to fashion an equitable remedy and the ability of a defendant to counterclaim under Section 113 are fully adequate protection against unfair results from Section 107 cases.

E. The United States' contention that settlement will be discouraged and enforcement impaired by the existence of a cost recovery right for PRPS that volunteer is unrealistic.

The United States' position in its opening brief is that allowing PRPs a cost recovery right under section 107 would undermine or even "emasculate" the effectiveness of sections 113(f)(1) and 113(f)(3)(b). See *Br. for United States* at 30-31and 39-41. MWRD submits that these claims lack real world substance. Section 113(f)(3)(b) allows those who

[15] Examples of minor share cases would include *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 616 (7th Cir. 1998), *United States v. R.W. Meyer, Inc.*, 932 F.2d 56[illegible], 571-72 (6th Cir. 1991), and *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998).

settle with the Government to sue non-settlers. It seems elementary that nothing in this subsection would prohibit a suit by a settler against a volunteer PRP who remediates a site. Certainly that volunteer might answer with a counterclaim, but in the end, nothing inherent in the fact that a volunteer is a volunteer would prevent a fair allocation of responsibilities and costs. And Section 113(f)(1) allows PRP contribution suits "during or after" a section 106 or 107 action. Again, how does a volunteer's cleanup activity interfere with a PRP's right to sue?

Moreover, section 113(f)(2) provides that:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide . . .

This provision does not appear seriously to limit the United States and settling parties in determining what "matters" are "addressed" in a settlement agreement. Surely the United States is not suggesting that a court could be required to make a settling party pay more than what is fair if a volunteer PRP cleans up the site and sues that party. Indeed, District Courts have found it fair and appropriate to bar suits by non-settlers under such circumstances, recognizing the effect of the settlement. *See, e.g., United States v. SCA Services of Indiana, Inc.*, 827 F.Supp. 526 (N.D. Ind.1993). In any event, that is not the case before the Court.

If a PRP voluntarily expends funds for remedial action in a manner consistent with the NCP, that can only preserve the limited monies in the Superfund and elsewhere that might be used for another site. If that PRP in turn sues other PRPs for recovery of costs, those PRPs are hurt only

if the courts refuse to take into consideration whatever cooperation with or payments they may have already made in dealing with the United States. The latter notion assumes that courts will not see themselves as having equitable or common law power to be fair and give credit where credit is due. But that outcome is most unlikely given the courts' acknowledged powers to attend to the details of CERCLA liability in accordance with "traditional and evolving principles of common law." 126 CONG. REC. 31,965 (1980) (statement of Rep. Florio); *see also, United States v. USX Corp.*, 68 F.3d 811, 824 (3d Cir. 1995).[16] But having common law principles govern the size of a cost recovery award is virtually meaningless if cost recovery rights are limited to only innocent parties in the first place. Indeed, since the United States' or State's response need only be proven "not inconsistent" with the NCP, while a private response must be proven "consistent" with the NCP, one has to wonder under what scenario the NCP, much less a court considering it under CERCLA, would allow some sort of double recovery. No situation comes to mind where this is likely.

The United States can bring overwhelming power to bear on private parties that it considers liable for CERCLA sites. It may order parties to do work at these sites under Section 106, and it may recover treble damage civil penalties for unreasonable refusals. And no rational party is going to dishonor a Section 106 order without being very confident it is an unlawful one; as the Seventh Circuit has observed, "[a] party served with a unilateral order under section 106 has little or no choice but to comply." *Akzo Coatings Inc. v.*

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[16] The resort to common law principles was not an idea limited to one chamber of Congress. In the Senate, the Hon. Jennings Randolph indicated plainly: "It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law." 126 Cong. Rec. 30,932 (1980).

Aigner Corp., 30 F.3d 761, 769 (7th Cir. 1994). Thus the situation hardly is one of weakness or lack of ability to work the sovereign's will. If a PRP acts as a renegade, could it not be ordered to desist from work in the right situation (assuming it even has a right to enter the site and do the remedy)? Could the United States not sue it along with other PRPs and force a hashing out of fair shares? The United States can do all these things and more. The United States may also sue parties under section 107, not only for future work but for past costs it has properly expended.

The United States' assertion that ability to achieve settlement will be undermined is fanciful. See, *e.g., Br. for United States* at 37-38. Section 113(f)(2) is not at all limited by its terms to the settlement of claims made under section 113. The scope of "matters covered" by a settlement under section 113 can include any renegade PRP, and it is unclear why the United States would not simply sue as a PRP every PRP it considers significantly responsible in the first place. For that matter, if the Court were to uphold a volunteer plaintiff's right of cost recovery under section 107 and also indicate that such a right of cost recovery is enforceable in practice in the manner of a "contribution" right or only to the extent of a defendant's just share, the "problem" the United States asserts would entirely disappear even as a abstract proposition, because all that any voluntary PRP plaintiff seeking cost recovery could ever expect to recover would be expenditures in excess of those reflecting its own fair share of the problem.

Additionally unconvincing is the United States' suggestion that allowing cost recovery actions under Section 107 would somehow "undermine" enforcement of Section 113. *Br. for United States* at 30. Indeed, the sections' respective limitations periods are triggered by different events, making the Congressionally-prescribed set of remedies and their limitations periods somewhat less seamless than the United States suggests. For contribution claims filed under

Section 113, the three-year limitation period set forth in Section 133(f) runs from a date certain, *i.e.*, either the date of the filing of initial suit against the PRP or the settlement date. But an action for removal cost recovery under Section 107 must, under Section 113(g)(2), be filed within three years of the completion of the removal action, and for remediation must be filed within six years of the initiation of a remedial action. But nothing about these differing limitations schemes, set forth within the same statutory section (Section 113), supports a restrictive reading of *who* may pursue one of the remedies so limited.

If Congress prescribed different elements for the two causes of action (contribution and cost recovery), why could it not prescribe different limitations periods for the two as well? Indeed, it is not hard to imagine why Congress would be more "generous" in prescribing limitations periods applicable to potential volunteer PRPs facing alone the difficult burdens of maintaining "consistency with the NCP" without the enforcement powers and expertise of the United States or a State (and, for many landowners including those like MWRD that are taxpayer-funded, without the ready resources as well).

III. THE SEVENTH CIRCUIT RECENTLY RULED IN A CORRECT AND CONVINCING MANNER ON THE QUESTION BEFORE THIS COURT

The United States attacks the Seventh Circuit's recent reading of Section 107(a) in the case it decided wherein *Amicus* is the plaintiff. See *Br. for United States* at 19, citing *Metropolitan Water Reclamation Dist. v. North Am. Galvanizing & Coatings, Inc.*, 433 F.3d 824 (7th Cir. 2007). Given this direct attack on MWRD's very own case, your *Amicus* will respectfully address a few of the points made by the Seventh Circuit in properly rejecting the position advanced in that court by the United States as *amicus curiae*.

A. The United States' reading of the statute is ungrammatical and does violence to Section 107(a)(1)-(4).

The United States concedes, as it must, that Section 107(a)(1)-(4)(B) provides a cause of action for cost recovery to "any other person" that incurs costs in responding. With this concession (which is plainly correct on the law) the issue of whether the *right* of cost recovery is "express" or "implied" becomes a proverbial "red herring." Were there not such a cause of action for "any other person," in clause B of Section 107(a)(1)-(4), there would be no grammatical sense in permitting the United States itself to bring cost recovery actions under clause (A) of the very same section of the statute.

The United States' suggested limitation on subsection 107(a)-(4)(B) plaintiffs stems from a reading that is not grammatical. The phrase "by any other person" is a prepositional phrase that is answering the question "who?", and it functions as a modified noun that identifies and distinguishes a class of plaintiffs in subsection (B) from a previous plaintiff class expressly denominated in the immediately antecedent subsection (A).[17] The result urged by the United States is a reading that would improperly amend the law through the use of bad grammar.

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[17] See, *e.g.*, M. LESTER & L. BEASON, THE MCGRAW-HILL HANDBOOK OF ENGLISH GRAMMAR AND USAGE (2005) (ISBN 0-07-144133-6) Chapter 2, at 23-24 and 37-38.

B. Section 107 expressly allows "cost recovery" to be sought by "any other person," without limiting to non-PRPs the class of plaintiffs that fall within that broadest of phrases. No judicial deference to the United States' limited reading of "any" is required or appropriate.

The basis of the Court's decision in *Cooper Industries, Inc. v. Aviall Services Inc.*, 543 U.S. 157, 166 (2004), was the straightforward "natural meaning" of the statute itself. Reading subsection 107(a)(1)-(4)(B) in the identical spirit demonstrates that the phrase "any other person" identifies a class of persons who may seek cost recovery under a distinct and more difficult standard of proof than the "persons" identified in the preceding subsection 107(a)(1)-(4)(A). The meaning of subsection (B) is thus plain: "any other person" than a just-specified subsection (A) plaintiff has the right of action and bears the burden of proof set forth in subsection (B). Any other meaning would be unnatural.

There are no fancy terms of art or environmental science involved in construing subsection 107(a)(1)-(4)(B). No agency rule or policy statement is involved. In fact, the issue has not been left to agency discretion in any manner. Deference to a government agency's interpretation of federal court jurisdiction is thus not appropriate in these circumstances. *See United States v. Mead Corp.*, 533 U.S. 218, 233-34 (2001).

C. Congress intended to encourage those involved with polluted sites to clean them up themselves rather than await government enforcement action.

CERCLA was meant to encourage "persons" involved with polluted sites to clean them up without invariably waiting for the Government to undertake a cleanup itself, issue a

cleanup order or file a lawsuit. The availability of a right to contribution was viewed as a major incentive to liable parties to undertake early cleanup action, with an understanding that a fair share of the response costs they incurred could be recovered from other responsible parties. *See, e.g.*, H.R. REP. NO. 96-1016(I), at 17 (1980), 1980 U.S.C.C.A.N. 6119, 6120, 1980 WL 12937. ("The legislation would also establish a federal cause of action . . . to induce such persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites"); 126 CONG. REC. 26,338 (1980) (remarks of Rep. Florio; CERCLA's liability scheme "creates a strong incentive both for prevention of releases and voluntary cleanup of releases by responsible parties"); *cf. Key Tronic Corp. v. United States*, 511 U.S. 809, 819 n.13 (1994) ("We recognize that CERCLA is designed to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others," quoting *FMC Corp. v. Aero Industries, Inc.*, 998 F.2d 842, 847 (10th Cir. 1993)).

The Seventh Circuit, in the case in which your *Amicus* was the appellee, correctly perceived that Congress' desire to encourage voluntary cleanup actions would be equally well served by holding that cost recovery rights are available to PRPs. After adopting the plain reading of Section 107 urged by MWRD, the court added:

> In addition, we are concerned that prohibiting suit by a voluntary plaintiff like [MWRD] may undermine CERCLA's twin aims of encouraging expeditious, voluntary environmental cleanups while holding responsible parties accountable for the response costs that their past activities induced. As *Consolidated Edison*, *Atlantic Research* and several post-*Cooper Industries* district court decisions have recognized, in order to further CERCLA's policies, potentially responsible parties must be allowed to

> recover response costs even before they have been sued themselves under CERCLA or have settled their CERCLA liability with a government entity. Were a cost recovery action unavailable in these circumstances, the Second Circuit reasoned, "such parties would likely wait until they are sued to commence cleaning up any site for which they are not exclusively responsible because of their inability to be reimbursed for cleanup expenditures in the absence of a suit." *Consol. Edison*, 423 F.3d at 100. As the [Second Circuit] concluded, this result "would undercut one of CERCLA's main goals, 'encourag[ing] private parties to assume the financial responsibility of cleanup costs by allowing them to seek recovery from others.'" Id. (quoting *Key Tronic*, 511 U.S. at 819 n.13 (internal quotation marks omitted)).

433 F.3d at 836.

The Seventh Circuit thus correctly rejected the forced reading of Section 107 advanced by the United States as inconsistent both with CERCLA's plain language and its animating legislative policies. The knowledge that such rights are available will, as in the case of MWRD, play a crucial role for any PRP, but especially for the many governmental entities that, like MWRD, own land used by others and depend on taxpayers to finance their operations and activities. Effectuation of both CERCLA's letter and spirit thus require that the decision below be affirmed.

CONCLUSION

Your *Amicus* respectfully submits that the statute speaks for itself on the legal question before the Court. Also, not only would the remedial and "polluter pays" principles of CERCLA be weakened considerably by adopting the United States' view of the law, but the resulting policy would be bad for the economy and the environment. The Court should affirm.

Respectfully submitted,

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APRIL 4, 2007

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No. 06-562

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC RESEARCH CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICI CURIAE NATURAL RESOURCES DEFENSE COUNCIL, PROF. CRAIG N. JOHNSTON, PROF. WILLIAM F. FUNK, PROF. MARTHA L. JUDY PROF. NINA A. MENDELSON, PROF. JEFFREY G. MILLER, PROF. PATRICK A. PARENTEAU, AND PROF. ZYGMUNT J.B. PLATER IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE

Amici Curiae are a national environmental organization and seven law professors. The Natural Resources Defense Council, which has 1.2 million members and supporters, uses law and science in an effort ensure a safe and healthy environment for all living things. The *amici* law professors are teachers and students of environmental law, and have a longstanding interest in the Superfund program established by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

The *amici* believe this case presents an important opportunity for this Court to affirm the right of private parties to recover cleanup costs under CERCLA. *Amici* are concerned that, if accepted by the Court, the Government's interpretation would undermine CERCLA's goals of promoting the expeditious cleanup of contaminated sites and ensuring that those responsible bear their share of any resulting cleanup costs. *Amici* believe the Government's interpretation would result in both fewer cleanups and inequitable burdens on those who do step forward.

A further description of the *amici* is set forth in an Appendix to this brief.[1]

SUMMARY OF THE ARGUMENT

When Congress first enacted CERCLA in 1980, it provided two different categories of plaintiffs with causes of action to recover costs incurred in cleanup efforts. First, Section 107(a)(4)(A) provided the United States, States, and Indian tribes with the authority to sue those deemed

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[1] The parties' written consents to the filing of this brief are being submitted to the Clerk of this Court. Pursuant to S.Ct.R. 37.6, *amici* affirm that this brief was not authored in whole or in part by counsel for a party, and that no monetary contribution to the preparation or submission of this brief was made by any person other than *amici* or their counsel.

responsible under § 107(a) (often referred to as "potentially responsible parties" or "PRPs") to recover costs "not inconsistent with" a document known as the National Contingency Plan ("NCP"). 42 U.S.C. § 9607(a)(4)(A).[2] And second, Section 107(a)(4)(B) gave "other person[s]" that same authority, with the difference that these persons are required to demonstrate that their cleanups are "necessary" and "consistent with" the NCP. 42 U.S.C. § 9607(a)(4)(B).

Congress has amended CERCLA comprehensively only once, though the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. 99-499, Oct. 17, 1986, 100 Stat. 1615. Before SARA was passed, the courts unanimously had recognized that § 107(a)(4)(B) creates a right of cost recovery in those private parties who cleaned up sites without having first been sued by the Government, regardless of any potential liability they themselves may have borne under the statute. *See, e.g., Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 890-892 (9th Cir. 1986) ("*Wickland*"). There was less agreement, however, regarding the availability of contribution rights for those who, in response to a lawsuit, had either undertaken cleanup measures or reimbursed the Government for its cleanup costs. *Compare, e.g., Colorado v. ASARCO, Inc.*, 608 F.Supp. 1484, 1486-1493 (D.Colo. 1985) (finding a federal common law right of contribution), and *Wehner v. Syntex Agribusiness, Inc.*, 616 F.Supp. 27, 31 (E.D.Mo. 1985) (contribution right implied in § 107(e)(2)), with *United States v. Westinghouse Elec. Corp.*, No. IP 83-9-C, 1983 WL 160587 (S.D. Ind. 1983) (no right of contribution).

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[2] The Government refers to the key statutory subsections in this case as § 107(a)(1)-(4)(A) and 107(a)(1)-(4)(B). While we agree that all of the liable parties referenced in subsections (1)-(4) are responsible for the costs specified in subclauses (A) and (B), we refer to these provisions as (a)(4)(A) and (a)(4)(B) to maintain consistency with this Court's usage *Cooper Industries, Inc., v. Aviall Services, Inc.*, 543 U.S. 157 (2004).

Congress acted against this backdrop in 1986. In passing SARA, Congress left § 107(a)(4)(B) unaltered, preserving the private right of cost recovery. It did, however, move to solidify the contribution rights of two groups of parties. First, in § 113(f)(1) it created an express right of contribution in those who either had been or were being sued under either § 106 or § 107 of CERCLA. 42 U.S.C. § 9613(f)(1). Additionally, in § 113(f)(3)(B), Congress did the same with respect those who had entered into settlements with either the United States or a State. 42 U.S.C. § 9613(f)(3)(B).

In the wake of SARA, but before this Court's decision in *Cooper Industries, Inc., v. Aviall Services, Inc.*, 543 U.S. 157 (2004) ("*Cooper Industries*"), the lower courts took a wrong turn. As the court below noted, the lower courts began "directing traffic" between §§ 107 and 113(f), generally steering CERCLA plaintiffs who bore potential liability away from cost recovery in favor of the contribution-based remedies available under § 113(f). *Atlantic Research Corp. v. United States*, 459 F.3d 827, 832 (8th Cir. 2006) ("*Atlantic Research*"). In some cases, this was justifiable, as parties who had been given contribution claims under § 113(f) tried to avoid some of that subsection's more restrictive dynamics by availing themselves of the more favorable dynamics of § 107(a)(4)(B). *See, e.g., United Technologies Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, (1st Cir. 1994) (involving a plaintiff who had entered into a consent decree with EPA, but sought to use § 107(a)(4)(B) due to its more permissive statute of limitations). In other cases, however, the courts erred by steering parties to contribution-based remedies despite the fact that they had valid claims under § 107(a)(4)(B), but invalid claims under § 113(f). *See, e.g., Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997) ("*Pinal Creek*") (involving plaintiffs

who had cleaned up a site without being subjected to any lawsuit or administrative edict).[3]

The courts provided three main rationales for steering parties toward § 113(f). First, they expressed concern about the circumvention of § 113(f), often without analyzing whether that section even applied; second, they were of the view that any application of § 107(a)(4)(B) would result in the plaintiff being able to impose all of the relevant cleanup costs on the defendants under principles of joint and several liability; and third, many deemed the plaintiffs' claims to be "quintessential" claims for contribution, *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 423-424 (2d Cir. 1998) ("*Bedford Affiliates*") (identifying all three concerns). As demonstrated below, the first and third of these rationales are misplaced in contexts in which the plaintiff has not been subjected to a lawsuit. The second is simply incorrect.

Despite the courts' reluctance to apply § 107(a)(4)(B) on behalf of those who themselves bore potential liability under CERCLA, none of the pre-*Cooper Industries* courts denied the plaintiffs a claim. Even in the absence of a prior or

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[3] There are six categories of plaintiffs who may seek to rely on CERCLA to impose some or all of their cleanup costs on others: (1) those who bear no potential liability under § 107; (2) those who either are being or have been sued under CERCLA; (3) those who have entered into an administrative settlement with either EPA or a State; (4) those who "voluntarily" clean up sites (meaning that they do so without any lawsuit or legally-binding administrative edict); (5) those who remediate sites pursuant to EPA-issued unilateral orders under § 106 of CERCLA; and (6) those who either are being or have been sued under State law, or have cleaned up a site pursuant to either a State-issued unilateral order or some other mechanism that does not meet the requirements of § 113(f)(3)(B). The Government's view is apparently that only those in the first three of these categories may use CERCLA to spread some portion of their cleanup costs onto others who are liable under § 107(a), with those in the first category having claims under § 107(a)(4)(B) and those in the latter two having claims under § 113(f)(1) and (f)(3), respectively. According to this view, those in the latter three categories have no remedy under CERCLA. This case involves a voluntary cleanup.

pending CERCLA action, every Circuit addressing the issue held that potentially-liable plaintiffs had either an express contribution claim under § 113(f) or an implied contribution claim either under § 107 itself or some combination of §§ 107 and 113(f).[4] Indeed, during this period even the Government took the position that potentially-liable plaintiffs had claims absent a prior or pending lawsuit; it argued that these claims arose through a combined effect of §§ 107(a) and 113(f). *See, e.g., Centerior Service Co. v. Acme Scrap Metal Corp.*, 153 F.3d 344, 350 (6th Cir. 1998) ("*Centerior*"). Thus, neither the courts nor the Government questioned whether the plaintiffs were entitled to relief; rather, they merely considered which provision (or provisions) of CERCLA provided the best basis for relief.

In *Cooper Industries*, this Court held that § 113(f)(1) does not provide a contribution claim if the would-be plaintiff is not being or has not been sued under CERCLA. 543 U.S. at 168. This leaves the question presented in this case: whether one who may bear partial responsibility for a contaminated site, but who cleans it up before being sued or otherwise compelled to do so, may sue other potentially liable parties for either cost recovery under § 107(a)(4)(B) or implied contribution under § 107. The better view is that such a party may sue for cost recovery under § 107(a)(4)(B).

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[4] *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 423-424 (2d Cir. 1998) (plaintiff who had entered into an informal agreement with the State had a claim under § 113(f)(1)); *Pneumo Abex Corp. v. High Point, Thomasville and Denton Railroad Co.*, 142 F.3d 769, 776 (4th Cir. 1998) (plaintiff who received unilateral orders from both the state and EPA could proceed under § 113); *Centerior Service Co. v. Acme Scrap Metal Corp.*, 153 F.3d 344, 352 (6th Cir. 1998) (unilateral order recipient had a claim under the combined effect of §§ 107(a) and 113(f)); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994) (unilateral order recipient had claim under § 113(f)(1)); *Pinal Creek, supra*, 118 F.3d at 1301-1302 (one who engages in a voluntary cleanup has a claim under a combination of §§ 107(a) and 113(f)); *Sun Co., Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1190-1191 (10th Cir. 1997) (same as *Centerior*).

ARGUMENT

1. THE PLAIN LANGUAGE OF CERCLA PROVIDES PRIVATE PARTIES WITH A COST-RECOVERY CLAIM

Section 107(a) identifies four categories of liable parties, including (1) the owner and operator of the relevant facility; (2) anyone who owned or operated the facility when the disposal occurred; (3) anyone who "arranged for disposal" of hazardous substances at the site; and (4) transporters who chose the site as the destination for the waste. It further provides that, subject to an exclusive list of defenses, these parties "shall be liable for-

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; [and]
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan . . . ."

Thus, § 107(a) creates causes of action for cost recovery in two separate groups of parties. First, § 107(a)(4)(A) creates a cost-recovery claim in the United States, the States, and Indian tribes ("the Sovereigns"). Section 107(a)(4)(B) creates a similar cost-recovery claim, with a slightly different burden of proof, in "other person[s]." In *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994) ("*Key Tronic*"), this Court recognized that the purpose of this latter clause is "to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others." *Id.* at 819, n.13.

As the Seventh Circuit pointed out in *Metropolitan Water Reclamation District of Greater Chicago v. North American Galvanizing & Coatings, Inc.*, 473 F.3d 824 (7th

Cir. 2007) ("*Metropolitan Water*"), the phrase "other person" in §107(a)(4)(B) is used to distinguish between private parties (and others such as non-profits and municipalities) and the Sovereigns addressed in the preceding clause:

> . . . [W]e read "other" as distinguishing "any other person" from the [the Sovereigns] listed in the immediately preceding subsection. These parties, as subsection (A) states, may recover costs "*not inconsistent* with the national contingency plan." By contrast, "any other person" is limited to recovery of those costs "*consistent* with the national contingency plan." Thus, we read the two subsections, and the reference to "any other person," simply as the statute's way of relaxing the burden of proof for governmental entities, as opposed to private parties.

473 F.3d at 835 (citations omitted) (emphasis in original).[5] Other courts long have recognized that this was Congress's purpose in differentiating between the two groups of parties in § 107(a)(4)(A) and (B). *See, e.g., United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 747-748 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *see also Ohm Remediation Services v. Evans Cooperage Co., Inc.*, 116 F.3d 1574, 1579 (5th Cir. 1997) ("the combination of these two clauses in section 107 evidences congressional intent that anyone is eligible to recover response costs").

The juxtaposition between the Sovereigns authorized to sue under § 107(a)(4)(A) and the "other person[s]" who can bring suit under § 107(a)(4)(B) is underscored by the structure of the relevant subsections. Subsection (a)(4)(A) states that PRPs are liable for "*all costs of removal or remedial action incurred by* the [the Sovereigns] not inconsistent with the [NCP]." 42 U.S.C. § 9607(a)(4)(A)

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[5] *See also Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 936, n.9 (8th Cir. 1995), and *Pinal Creek*, 118 F.3d at 1301 (concluding that a PRP can qualify as "any other person" under § 107(a)(4)(B)).

(emphasis added). Subsection (a)(4)(B) makes those same PRPs liable for "*any other necessary costs of response incurred by* any other person consistent with the [NCP]." *Id.* § 9607(a)(4)(B) (emphasis added). The first "other" in § 107(a)(4)(B) ("other necessary costs") distinguishes the costs referred to from those specified in § 107(a)(4)(A) ("all costs of removal or remedial action incurred by [the Sovereigns]"). If the first "other" relates back to subparagraph (A), then as a matter of parallelism, the most natural reading of the second "other" is that it also relates back to subparagraph (A), and thus describes any person "other" than the Sovereigns.

The symmetry between the two relevant clauses also exists at a more general level. Both create causes of action, albeit in different sets of parties, with the potential defendants being named before the plaintiffs.[6] Both refer to the same categories of costs,[7] and both use the same passive verb formulation, "incurred by." The structural parallelism of the two clauses is complete, strongly suggesting that they should be construed by reference to each other.

The natural understanding of the "any other person" language in § 107(a)(4)(B) is further underscored by the use of the phrase "other person" in § 111(a) of CERCLA. There, the statute speaks to the uses to which monies in the

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[6] In *Key Tronic*, the members of this Court disagreed on how to characterize the nature of the § 107(a)(4)(B) claim. The majority, while noting that § 107 "unquestionably provides a cause of action for private parties to seek recovery of cleanup costs," deemed the claim to be implied rather than explicit. 511 U.S. at 818. In dissent, Justices Scalia, Blackmun and Thomas deemed the cause of action to be express, not implied. 511 U.S. at 822. The key point is not whether the private-party cause of action is implied or express, but rather that structurally it is set out in the exact same fashion as are the claims of the Sovereigns under § 107(a)(4)(A).

[7] As this Court noted in *Key Tronic*, § 101(25) defines the term "response" to include both removal and remedial action. 511 U.S. at 813. Thus, there is no difference between "costs of removal or remedial action" and "costs of response."

Hazardous Substance Superfund ("Fund") may be put. Subsection 111(a)(1) specifies that these monies may be used for the "[p]ayment of governmental response costs incurred pursuant to [§ 104]." 42 U.S.C. § 9611(a)(1).[8] By contrast, § 111(a)(2) provides that these funds may also be made available for costs incurred by "any other person," so long as the costs are approved the responsible Federal official. 42 U.S.C. § 9611(a)(2). Here again, as in § 107(a)(4), the contrast is between governmental entities and "other person[s]." Here also, there is zero indication that the phrase "other person" is meant to exclude anyone other than the governmental entities covered under the prior provision.[9]

The Government's reading of § 107(a)(4)(B) also errs in presuming liability where none has been established. In this case, as would be true in all cases in which private plaintiffs have no claims under § 113(f), the Respondent had not been determined to bear liability under § 107 through any judicial or administrative process prior to the filing of its complaint.[10] Instead, it "voluntarily investigated and cleaned up the contamination," before any agency compelled it to do so. *Atlantic Research*, 459 F.3d at 829. Nothing in either CERCLA or any other law required it to self-identify as a liable party at the time it filed its complaint. Thus, both the

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[8] This reference to "governmental response costs" includes not only costs incurred by EPA, but also by States and tribes, as they may have access to Fund dollars under § 104(d)). *See* 42 U.S.C. § 9604(d).

[9] Indeed, Congress acted on the assumption that PRPs are "other person[s]" under this language when it enacted § 106(b)(2)(D), in which it provided that even those unilateral-order recipients who prove to be liable under § 107 are sometimes entitled to reimbursement from the Fund after they comply with those orders. 42 U.S.C. § 9606(b)(2)(D).

[10] The only arguable exception to this statement is in the context of unilateral orders under § 106. Even in that context, however, EPA's liability determination is non-binding. *See* 42 U.S.C. § 9606(b)(2)(C) (entitling the recipient of such an order to *de novo* review of its liability in the district court after complying with the order).

United States and the district court should have treated the Respondent as an innocent party until its liability was both pleaded and established. *See Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.*, 423 F.3d 90, 97 n.8 (2d Cir. 2005) ("*Consolidated Edison*") (declining to refer to the plaintiff as a "PRP" because that might "confer on a party that has not been held liable a legal status that it should not bear"). Put another way, the defendant in a cost-recovery action should bear the burdens of both pleading and proof with respect to the plaintiff's potential liability.[11]

The infirmity of the Government's interpretation of the "other person" language is further highlighted when one considers how inconsequential it would have rendered § 107(a)(4)(B) when first promulgated. The vast majority of private party actions under CERCLA are brought by those who own or do business on the property they are cleaning up.[12] When CERCLA was first passed, however, virtually all those who owned and operated contaminated sites bore liability. Starting with the Second Circuit's seminal decision in *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985), the courts universally interpreted § 107(a)(1) as imposing strict liability on current owners and operators,

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[11] This, of course, is consistent with how tort law deals with the issue of the plaintiff's potential role in contributing to its own injuries; that is, the defendant generally bears the burden of both pleading and proof with respect to defenses such as contributory and comparative negligence. Dobbs, The Law of Torts, § 198, p. 493 (West, 2000). CERCLA contains a ready mechanism by which a defendant can raise the plaintiff's potential liability and thereby seek to avoid joint and several liability. *See*, *infra*, text accompanying nn. 30-32.

[12] In preparation for writing this brief, we reviewed all CERCLA decisions appearing in Westlaw decided between the years 1995 and 2000. In reviewing these decisions, which involved 364 contaminated sites, we identified 210 cases that would not meet the requirements of § 113(f). Of those, all but one appeared to involve a plaintiff that would qualify as either an owner or an operator under § 107(a). *But see Ohm Remediation Services v. Evans Cooperage Co., Inc.*, 116 F.3d 1574 (5th Cir. 1997) (brought by a cleanup contractor).

without regard to causation.[13] Moreover, Congress did not create the "innocent landowner defense" until it passed SARA in 1986. *See* 42 U.S.C. § 9601(35). Until then, it was impossible for one who acquired property from a contaminator to assert a defense.[14]

The United States references three types of plaintiffs who might be able to bring claims under its reading of § 107(a)(4)(B): those who own land upon which third parties spill waste, those whose land is contaminated by wastes migrating from upgradient properties, and "bona fide prospective purchasers" under §§ 101(40) and 107(r)(1). Brief for the United States ("U.S. Brief"), at 16. In terms of trying to understand what Congress was trying to achieve in 1980, this last category can summarily be dismissed; it simply didn't exist until Congress passed the Small Business Liability Relief and Brownfields Revitalization Act of 2002, Pub. L. 107-118, Jan. 11, 2002, 115 Stat. 2356 (creating what are now CERCLA §§ 101(40) and 107(r)(1)).

The Government's argument is also problematic with regard to the first two categories of landowners it identifies. Both would be presumptively liable as current owners under CERCLA, in that, if they were sued, the plaintiff would be able to make out its prima facie case merely by showing that

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[13] *Shore Realty* is the single most-cited CERCLA decision. According to Westlaw (as of a search conducted on March 15, 2007), it has been cited 466 times, including twice by this Court (in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

[14] This is because § 107(b)(3) requires one asserting the "third party defense" under the statute to show that the third party's actions did not occur "in connection with" a "contractual relationship" with the person asserting the defense. Although the pre-SARA version of CERCLA did not define the term "contractual relationship," *compare* 42 U.S.C. § 9601(35), the very fact that Congress carved out an "innocent landowner defense" in 1986 suggests that Congress thought that these landowners would otherwise be responsible for contamination caused by their predecessors in title. *See United States v. Hooker Chemicals & Plastics Corp.*, 680 F.Supp. 546 (W.D.N.Y. 1988).

they owned the property upon which hazardous substances had come to be located; in order to defeat this liability, these landowners would bear the burden of showing they met the requirements of the "third-party defense" under § 107(b)(3). 42 U.S.C. § 9607(b)(3).[15] The Government never explains how a plaintiff is to establish that it meets this defense at the time it files its complaint, thus entitling it to proceed under the Government's cramped view of § 107(a)(4)(B).[16]

The Government's interpretation of § 107(a)(4)(B), which it apparently arrived at only recently,[17] is also flatly

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[15] *See* CERCLA §§ 101(14) (definition of "facility") and 107(a)(1) (imposing liability on the current owner), 42 U.S.C. §§ 9601(14) and 9607(a)(1); *see also Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 (7th Cir. 1994). Interestingly, the Seventh Circuit later embraced a hybrid approach to the applicability of § 107(a)(4)(B), indicating that those who are "blameless" (in the sense that they did not contribute to the contamination) may bring claims thereunder even if they are liable under § 107(a) and unable to establish a defense under § 107(b). *See, e.g., Rumpke of Ind., Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1239-1241 (7th Cir. 1997) ("*Rumpke*"). While the Government does not advocate this position, we note that it has no textual support. Moreover, three other Circuits have rejected it. *Bedford Affiliates*, 156 F.3d at 424-425; *Morrison Enterprises v. McShares, Inc.*, 302 F.3d 1127, 1134-1135 (10th Cir. 2002); and *Western Properties Service Corp. v. Shell Oil Co.*, 358 F.3d 678, 689-690 (9th Cir. 2004).

[16] It may be that the Government expects a landowner plaintiff to file its claim under § 107(a)(4)(B), and then have it either be dismissed (if the defendant establishes the plaintiff's liability and the plaintiff does not establish a defense) or allowed to go forward (if the defendant either fails to establish the plaintiff's liability or the plaintiff establishes a defense). *Cf. Rumpke*, 107 F.3d at 1240-1241. There is nothing in the statute that appears to contemplate such an odd dynamic. Moreover, it would run counter to the first clause in § 107(a). *See* 42 U.S.C. § 9607(a) (liability is subject "only" to the defenses in § 107(b)).

[17] As best we can determine, the Government first made this argument in the amicus brief it submitted to the Seventh Circuit last May in *Metropolitan Water, supra*. *See* 2006 WL 1354188, Brief of the United States as Amicus Curiae (May 1, 2006). The United States itself did not raise this argument in its brief to the Eighth Circuit below. *See* 2005 WL 3568541, Brief of the United States as Appellee (December 5, 2005).

inconsistent with the Government's long-held interpretation of the "any other person" language and the significance of the juxtaposition between § 107(a)(4)(A) and (B). *See, e.g.*, 55 Fed. Reg. 8666, 8792 (March 8, 1990) (preamble to the NCP) (noting that the proposed rule set out the requirements for "response action by 'other persons' *(i.e., persons who are not the federal government, a state, or an Indian tribe)* . . ." (emphasis added). It also in significant tension with an EPA regulation providing that cleanup actions taken by those to whom EPA has issued unilateral orders under § 106(a) shall be deemed to be consistent with the NCP for purposes of any cost-recovery actions they may bring against other PRPs. 40 C.F.R. § 300.700(c)(3)(ii). On its face, this regulation contemplates that order-recipients are eligible to bring cost-recovery actions under § 107(a)(4)(B). As the Government may issue these orders only to liable parties, its current interpretation of the "any other person" language would render this regulation a virtual nullity.[18]

Lastly, the Government's reading flouts the purposes of both CERCLA in general and § 107(a)(4)(B) in particular. When it first passed CERCLA, Congress had two interrelated goals: to promote cleanup and to "assur[e] that those who caused chemical harm bear the cost of that harm. . . ." S.Rep. N. 848, 96th Cong., 2d Sess., at 13 (1980); *see also United States v. Olin Corp.*, 107 F.3d 1506, 1514 (11th Cir. 1997) ("*Olin*") (citing "Congress's twin goals of cleaning up pollution . . . and of assigning responsibility to culpable parties").[19] With respect to promoting cleanup, Congress wanted to supplement the government's efforts by

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[18] It is possible that EPA could issue a unilateral order to one whom it believed to be liable, but whom a court ultimately might deem not to be so. *See, e.g.*, 42 U.S.C. § 9606(b)(2). There is no indication, however, that EPA was thinking about such a small subset of unilateral order recipients when it promulgated 40 C.F.R. § 300.700(c)(3)(ii).

[19] The Government concedes these were Congress's goals when it passed SARA. *See* U.S. Brief, at 2.

"induc[ing] . . . potentially liable persons to pursue appropriate environmental response actions voluntarily." H.R. Rep. No. 1016, 96th Cong. 2d Sess., Pt. 1, at 32 (1980); *see also* S.Rep. No. 848, *supra*, at 31 (1980) ("This liability standard is intended to induce potentially responsible persons to voluntarily mitigate damages rather than simply rely on the Government to abate hazards"). Moreover, in the context of private-party cleanups, the purposes of promoting cleanup and imposing the costs on those responsible were linked. As this Court recognized in *Key Tronic*, the purpose of providing for private cost-recovery was "to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others." *Key Tronic*, *supra*, 511 U.S. at 819, n.13.

Given the above, it is unsurprising that no court has ever embraced the Government's "other person" argument. Even more tellingly, despite arguing that its interpretation leaves § 107(a)(4)(B) with "substantial operative effect," U.S. Brief, at 15, the Government fails to cite a single case in which a landowner (or anyone else) has filed and successfully prosecuted an action under its reading of that provision.[20] This Court has consistently rejected the efforts of those who have sought to find elephants in statutory mouseholes. *Whitman v. American Trucking Ass'ns*, 511 U.S. 457, 468 (2001). Here, the Government seeks to reduce § 107(a)(4)(B) to a mousehole, where Congress wanted a door large enough for all who undertake voluntary cleanups. The Court should not sanction this evisceration of the statute.

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[20] For its first two examples the Government quotes dicta from *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 861 (7th Cir. 1994) ("*Akzo*"). U.S. Brief, at 16 (quoting from *Akzo*, 30 F.3d at 764). For its third, it merely cites statutory language. *Id.* As mentioned in n.12, *supra*, our research has identified one case in which an allegedly non-liable cleanup contractor was allowed to invoke § 107(a)(4)(B) in a fashion that would conform with the Government's reading thereof. *See Ohm Remediation Services v. Evans Cooperage Co., Inc.*, 116 F.3d 1574 (5th Cir. 1997).

2. SARA CONFIRMS A BROAD UNDERSTANDING OF PRIVATE-PARTY COST RECOVERY FOR THOSE WHO DO NOT HAVE EXPRESS CONTRIBUTION CLAIMS

A. Neither SARA nor its Legislative History Give Any Indication that Congress Was Narrowing § 107(a)(4)(B).

As this Court noted in *Cooper Industries*, when Congress passed SARA in 1986 it was legislating against a backdrop that included a unanimous body of case law upholding the right of those who themselves bore potential liability to seek cost recovery under § 107(a)(4)(B) in situations in which they cleaned up sites without governmental prodding:

> After CERCLA's enactment in 1980, litigation arose over whether § 107, in addition to allowing the Government and certain private parties to recover costs from PRPs, also allowed a PRP that had incurred response costs to recover costs from other PRPs. More specifically, the question was whether a private party that had incurred response costs, but had done so voluntarily and was not itself subject to suit, had a cause of action for cost recovery against other PRPs. Various courts held that § 107(a)(4)(B) and its predecessors authorized such a cause of action.

543 U.S. at 162 (citations omitted).[21]

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[21] The Government tries to downplay the significance of *Wickland, supra*, 792 F.2d 887, one of the cases this Court cited in *Cooper Industries*. *See* U.S. Brief, at 29. This attempt is unavailing. *Wickland* was decided before SARA was passed. Thus, the court focused not on whether Wickland had been sued, but instead on the defendant's argument that Wickland could not bring a cost-recovery claim because the Calif. Dept. of Health Services, which oversaw Wickland's remedial activities, was not acting as a "lead agency" under § 104(d) for that site. The court framed the issue as involving whether § 107(a)(4)(B) is available only to those who have undertaken cleanup "pursuant to a

As this Court also noted, there was less certainty regarding "whether a private party that had been sued in a cost recovery action (by the Government or by another PRP) could obtain contribution from other PRPs":

> . . . As originally enacted in 1980, CERCLA contained no provision expressly providing for a right of contribution. A number of District Courts nonetheless held that, although CERCLA did not mention the word "contribution," such a right arose either impliedly from the provisions of the statute, or as a matter of federal common law. That conclusion was debatable in light of two decisions of this Court that refused to recognize implied or common-law rights to contributions in other federal statutes.

Id. at 162 (citations omitted); *see also United States v. Westinghouse Elec. Corp.*, No. No. IP 83-9-C, 1983 WL 160587 (S.D. Ind. 1983) (a pre-SARA case finding no right of contribution).

In passing SARA, Congress made no changes to the relevant portions of § 107. Instead, it left § 107(a)(4)(B) intact, preserving the private right of cost recovery in those who cleaned up sites without formal governmental prodding. Congress did, however, resolve the uncertainty regarding the availability of contribution. In § 113(f)(1) and (f)(3)(B), it created explicit contribution claims in those who either had been or were being sued under CERCLA, or had entered into settlements with either EPA or the States. *See* 42 U.S.C. § 9613(f)(1) and (f)(3)(B), respectively. Nothing in either of these subsections suggests that Congress intended them to operate in lieu of the rights previously conferred in § 107(a).

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governmentally authorized [CERCLA] cleanup program." 792 F.2d at 891. For purposes of the issue in this case, however, the key point is that the court recognized the validity of Wickland's claim despite the fact that Wickland clearly was one who bore potential liability as the current owner of the property. *See id.* at 889 (indicating Wickland's ownership).

Given that SARA made no changes to § 107(a)(4)(B), it is unsurprising that it has no legislative history bearing directly on that provision. Significantly, however, SARA does have legislative history bearing on the ability of those who bear potential liability under the statute to bring cost-recovery actions. Specifically, the House Energy and Conference Committee stated:

> [Section 113(f)] does not affect the right of the United States to maintain a cause of action for cost recovery under Section 107 or injunctive relief under Section 106, whether or not the U.S. was an owner or operator of a facility or a generator of waste at the site.

H.R. Rep. No. 253, 99th Cong. 1st Sess., Pt. 3, at 79-80 (1985). Read fairly, this statement supports two important propositions: first, that the Committee agreed with the case law that one's potential liability should not preclude one from using § 107(a) to seek cost recovery; and second, that § 113(f) should not be read as eviscerating this authority.[22]

The other legislative history addressing § 113(f) indicates that it was intended to "clarif[y] and confirm[] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances." S.Rep. No. 11, 99th Cong., 1st Sess., at 44

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[22] The Government, by contrast, draws two alternative inferences, either that "the Committee believed that a *private* PRP was not entitled to 'maintain a cause of action for cost recovery under Section 107' in the first place—or, at most, that any such action would not survive the enactment of § 113(f)." U.S. Brief, at 29. According to this logic, the Committee must also have been conveying implied messages about the absence of claims on the parts of States and tribes, for they similarly go unmentioned in this statement. This, of course, would flatly contradict the text of § 107(a)(4)(A), where States and tribes are on equal footing with the United States. It is much more likely that the Committee simply was focusing on the most prominent CERCLA plaintiff.

(1985); *see also* H.R.Rep. No. 99-253, *supra*, Pt. 1, at 79 (1985) (same). This quote addresses only the right of contribution under § 113(f), giving no hint that § 113(f) was intended to undermine § 107(a)(4)(B) in any way. Its narrow focus is confirmed by the fact that the quote speaks only to the rights of those who have been "held" jointly and severally liable under CERCLA, i.e., through a judicial action under either § 106 or § 107. The Government claims that, given the extant "uncertainty" regarding private rights of action, it is "peculiar" that Congress would have provided an express claim for contribution, but not a broader one for cost-recovery. U.S. Brief, at 29. The premise, however, is wrong. There was no uncertainty regarding whether CERCLA provided a private right of cost-recovery in those who undertook voluntary cleanup actions: § 107(a)(4)(B) provided it, and the courts unanimously had affirmed it. *Cooper Industries*, 543 U.S. at 163.

The legislative history of SARA thus confirms a simple narrative. Given the pre-existing cost-recovery right in § 107(a)(4)(B) and the judicial recognition thereof, Congress saw no need to reaffirm that right. In the contribution realm, by contrast, Congress sought to fill the statutory silence, and to respond to the uncertainty in the case law, by creating express rights in § 113(f). What little legislative history there is regarding the interrelationship between these new rights and the preexisting cost-recovery authorities confirms Congress' understanding that a party's potential liability should not preclude it from bringing a cost-recovery claim in appropriate circumstances.

B. The Lower Court Correctly Determined that § 107(a)(4)(B) Complements § 113(f)

The Government argues that even if § 107(a)(4)(B) could have been read to support a right of cost recovery in potentially liable parties before SARA was passed, it should

now be read more narrowly in light of § 113(f). U.S. Brief, at 26. This argument is flawed in several respects. First, it assumes a level of ambiguity that, as noted above, is simply absent in § 107(a)(4)(B). Second, it ignores the fact that nothing in either the text or the legislative history of SARA indicates that it was intended to repeal § 107(a)(4)(B) in the vast majority of its preexisting applications. And third, and most significantly, it also ignores that §§ 107(a)(4)(B) and 113(f) are distinct and complementary.

Put most simply, the lower court correctly determined that the best way to harmonize §§ 107(a)(4)(B) and 113(f) is by reading the former to apply to those "who have incurred necessary costs of response, but have neither been sued nor settled their liability under §§ 106 or 107." *Atlantic Research*, 459 F.3d at 835; *see also Consolidated Edison*, 423 F.3d at 100. Thus, every private party that incurs response costs has a remedy against other PRPs under CERCLA; the only question is whether that claim arises under § 107(a)(4)(B) or, alternatively, under § 113(f). This reading is consistent with both the relevant text and legislative history.[23]

The Government claims that this reading places an "atextual limit on [the lower court's] already strained interpretation of [§ 107]." U.S. Brief, at 32. This argument misses the mark. While we are unaware of any pre-SARA cases addressing the claims of those who cleaned up sites pursuant to EPA consent decrees, we believe that, even then, the better view would have been that such entities had, if anything, implied claims for contribution, not claims for cost

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[23] The correctness of this reading is most apparent in the context of voluntary cleanups, such as the one involved in this case. It is slightly more complicated in the context of those who have received unilateral orders under § 106(a) of CERCLA, given the similarity of the posture in which those parties find themselves as compared with that of traditional contribution plaintiffs. As discussed *infra* at pp. 25-26, the Court need not resolve this issue.

recovery. *See Sand Springs Home v. Interplastic Corp.*, 670 F.Supp. 913 (N.D. Okla. 1987) (the recipient of a unilateral order has an implied claim for contribution).[24] Put another way, before SARA, § 107(a)(4)(B) was at best ambiguous regarding whether it conferred a cost-recovery right on those who cleaned up sites pursuant to consent decrees;[25] however, it unambiguously provided such a right to those who engaged in voluntary cleanups. Seen in this light, Congress simply clarified through SARA that those who acted pursuant to consent decrees would be treated like their common law counterparts—their remedy would lie in contribution.

This harmonization of §§ 107(a)(4)(B) and 113(f) is also consistent with both *Branch v. Smith*, 538 U.S. 254 (2003) ("*Branch*"), and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) ("*Brown & Williamson*"). *Branch* establishes that courts have a duty to reconcile a preexisting statute and any amendments thereto to the

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[24] Although this case post-dates SARA, it was decided without reference to those amendments.

[25] Despite the apparently unqualified language in § 107(a)(4)(B), this ambiguity could be found in the tension between its apparent breadth and well-settled notions of the common law. Under the common law, the claim one who has settled with another may have against third parties is in fact a "quintessential" claim for contribution. *See, e.g.*, Black's Law Dictionary 328 (6th ed. 1990) (defining contribution as the "[r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion of which he ought to pay or bear"), and Restatement (Second) Torts § 886(a), cmt. b. (contribution "applies in favor of a tortfeasor who has paid more than his equitable share of the common liability in settlement, without any judgment or even suit against him"). This Court has indicated that it is sometimes appropriate for courts to imply exceptions in statutes based on common law traditions. *See, e.g., Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981) (implying common law defenses in 28 U.S.C. § 1983, despite its absolute language), and *United States v. Rogers*, 461 U.S. 677, 715 (1983) (Blackmun, J., dissenting) ("when broadly worded statutes . . . are in derogation of common-law principles, this Court has hesitated to heed arguments that they should be applied literally").

greatest extent possible. 538 U.S. at 273. *Brown & Williamson* teaches that:

> At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *United States v. Fausto*, [484 U.S. 439, 453 (1988)]. This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. As we recognized recently in *United States v. Estate of Romani*, "a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it has not been expressly amended." [523 U.S. 517, 530-531 (1998)].

Brown & Williamson, 538 U.S. at 143. The Government cites many of these principles, U.S. Brief, at 26-27, but draws from them the wrong conclusion. Instead of reading §§ 107(a)(4)(B) and 113(f) in harmony, it would rely on § 113(f) to override the clear text of § 107(a)(4)(B) and strip it of virtually all practical effect. This is not the type of reconciling required under *Branch*.[26]

The Government makes four additional arguments based on the perceived structural tension between §§ 107(a)(4)(B) and 113(f). The Government first argues that allowing those who may be liable to seek cost recovery under § 107(a)(4)(B) would undermine the three-year limitations period for actions under § 113(f), as plaintiffs would invoke § 107(a)(4)(B) in order to take advantage of the more

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[26] Even if this Court were to find that the text of §§ 107(a)(4)(B) and 113(f) cannot be harmonized, the better solution to this dilemma would be to create an implied exception in § 107(a)(4)(B), not to effectively repeal it. *See United States v. Novak*, 476 F.3d 1041, 1052, n.10 (9th Cir. 2007) (and cases cited therein).

generous limitations period applicable thereto. U.S. Brief, at 30; *see also* 42 U.S.C. § 9613(g)(2) and (3). This is a valid argument for reading § 113(f) as providing those who have claims thereunder with their sole remedy under CERCLA.[27] It is not, however, a basis for reading § 113(f) as repealing § 107(a)(4)(B) in situations in which § 113(f) does not apply.

The Government next argues that allowing those who voluntarily clean up sites to pursue cost recovery would undermine CERCLA's contribution-protection scheme. U.S. Brief, at 31. There is less here than meets the eye. Section 113(f)(2) gives those who settle with either EPA or a State protection against "claims for contribution regarding matters addressed in the settlement," 42 U.S.C. § 9613(f)(2). However, the very text of this provision reveals that this protection was never intended to be all-encompassing. First, the protection only extends to "matters addressed in the settlement."[28] And second, it is unclear whether contribution protection applies to claims other than those based in contribution.[29] Moreover, once EPA gets involved at a site,

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[27] Both of the cases the Government cites in its brief involved plaintiffs who had entered into consent decrees with the United States, and thus came within the literal terms of § 113(f). *See United Technologies Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96 (1st Cir. 1994), and *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997).

[28] Notably, the Government concedes that in some cases it would be unfair to characterize cleanup costs incurred by others as "matters addressed," and that the courts can review such characterizations as part of their fairness analysis when the signatories to any such settlements move to have them entered as consent decrees. EPA, Defining "Matters Addressed" in CERCLA Settlements, at 4-5 (March 4, 1997); *see also Akzo*, 30 F.3d at 767 (deeming work Akzo undertook prior to the entry of the relevant consent decree not to be a "covered matter" thereunder).

[29] To date, the courts have extended contribution protection to other common law claims, such as those based in indemnity. *See, e.g., United States v. Cannons Eng. Corp.*, 899 F.2d 79, 92-93 (1st Cir. 1990). It is not clear, however, that the courts would do the same regarding statutory claims. If, for example, a State and EPA were to consecutively undertake remedial measures at a given site, there would appear to be nothing in § 113(f)(2) that would prevent EPA from seeking cost recovery from a

it can control what happens there. Section 122(e)(6) precludes PRPs from undertaking remedial steps without EPA's approval once EPA begins a "remedial investigation and feasibility study." 42 U.S.C. § 9622(e)(6); *see also E.I. DuPont De Demours and Co. v. United States*, 460 F.3d 515, 539, n.28 (3d Cir. 2006) ("*DuPont*").

The proper scope of contribution protection is not before this Court. The Government has provided no evidence, however, that allowing private-party cost recovery would seriously undermine its ability to settle cases. As a practical matter, § 122(e)(6) renders fanciful the specter of PRPs running amok, filing claims that disrupt EPA settlements.

Third, the Government maintains that any application of § 107(a)(4)(B) would allow potentially-liable plaintiffs to impose joint and several liability on other PRPs, in lieu of the equitable allocation contemplated under § 113(f).[30] As the court below correctly observed, however, the defendant can readily avoid this possibility by filing a counterclaim under § 113(f); by pleading and proving the plaintiff's liability, such a defendant can transform the relevant action into one in which equitable allocation applies. *See Atlantic Research Corp.*, 459 F.3d at 835; *see also Consolidated Edison*, 423 F.3d at 100, n.9. Indeed, the Government has conceded that this is how the statute works when it invokes

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PRP who had entered into an administrative settlement with the State for the State's earlier cleanup measures. Because EPA's claim would not be for contribution, it would be facially beyond § 113(f)(2)'s protection. This would be true even if the State settlement purported to cover the entire cleanup effort (*i.e.*, including EPA's remedial actions).

[30] Other courts have raised a concern that cost-recovery claims filed by those who may themselves bear liability are "quintessential" claims for contribution. *See, e.g., Bedford Affiliates, supra*, 156 F.3d at 424. This, however, is untrue. Again, as would be the case in a tort action, those who engage in voluntary cleanups should be presumed to be non-liable until their liability has been pleaded and proved through the mechanism of a counterclaim. Read fairly, both Black's Law Dictionary and the Restatement (Second) of Torts support this idea. *See supra*, n. 25.

§ 107(a)(4)(A) despite its own potential liability at a given site. *United States v. Chrysler Corp.*, 157 F.Supp.2d 849, 860 (N.D. Ohio 2001) ("*Chrysler*"). There is nothing in the statute to suggest that the same dynamic could not also apply to private-party plaintiffs.[31]

Despite the Government's concession in *Chrysler* that counterclaims are a viable mechanism for addressing a plaintiff's potential liability under the Act, it here disparages that prospect by claiming that such an approach would require defendant PRPs to bear any so-called "orphan shares;" that is, the shares of other PRPs who are not before the court (*e.g.*, because they may be either defunct or bankrupt). U.S. Brief, at 37-38. This is not the case. Once the defendant files its counterclaim under § 113(f)(1) and establishes the plaintiff's liability, that provision expressly instructs the court to equitably allocate the response costs among the liable parties before it. 42 U.S.C. § 9613(f)(1). As at least four Circuits correctly have recognized, this can include reallocating any orphan shares. *See Centerior*, *supra*, 153 F.3d at 354 (§ 113(f) allows the district court to "apportion the amount of the orphan shares among the parties"); *Browning-Ferris Industries of Illinois v. Ter Maat*, 195 F.3d 953, 957 (7th Cir. 1999) (explaining its holding with a hypothetical indicating the same); *Pinal Creek*, *supra*, 118 F.3d at 303 ("Under § 113(f)(1), the cost of orphan shares is distributed equitably among all PRPs, just as cleanup costs are"); and *Morrison Enterprises v. McShares, Inc.*, 302 F.3d 1127, 1135 (10th Cir. 2002) (courts may

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[31] Surprisingly, despite its embrace of this approach when it is a plaintiff, in this case the Government quotes a district court opinion for the proposition that the cost-recovery-buffered-by-a-counterclaim dynamic would result in "sequential, piecemeal litigation." U.S. Brief, at 38 (quoting from *Town of New Windsor v. Tesa Tuck, Inc.*, 919 F.Supp. 662, 681 (S.D.N.Y. 1996)). The Government offers no reason why the courts are less capable of handling counterclaims than they are of handling contribution claims against third-party defendants (which are explicitly contemplated under § 113(f)(1)).

require even non-culpable PRPs to bear some portion of the orphan shares).[32]

The Government's fourth structural argument is that allowing cost-recovery claims would countermand the restriction that claims under § 113(f) may be brought only "during or following [a] civil action" under either §§ 106 or 107. U.S. Brief, at 32. This argument ignores that private cost-recovery actions arise under a separate statutory section, § 107(a)(4)(B). While the Government tries to support its theory by claiming that these are not wholly independent types of relief, *see id.* at 33, n.14, this Court has foreclosed that argument. *Cooper Industries*, 543 U.S. at 163, n.3 (deeming §§ 107(a)(4)(B) and 113(f) to be "clearly distinct"). Further, as the United States appears to concede, this argument vanishes if, as we argue, § 107(a)(4)(B) is unavailable to those who have contribution claims under § 113(f). U.S. Brief, pp. 32-33.

Finally, it is worth noting the Government's reading of § 107(a)(4)(B) would lead to a far greater structural problem than any the Government posits in its brief. Although this Court need not determine the nature of the claim, if any, that those who receive unilateral orders under § 106 may have against other PRPs, it seems likely that under the Government's interpretation they would have none.[33] This is so because, in all likelihood, EPA-issued unilateral orders under § 106 are not "civil action[s] under section 9606 … or

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[32] The other cases cited by the Government are not to the contrary. In *Elementis Chromium L.P. v. Coastal States Petroleum Co.*, 450 F.3d 607, 612 (5th Cir. 2006), the Fifth Circuit acknowledged that equitable allocation is appropriate under § 113(f)(1). *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997), does not speak to the possibility of equitable allocation in a case in which § 113(f)(1) is in play; the quoted "strain[] logic" language addresses only the possibility of a liable plaintiff recovering 100% of its cleanup costs, *id.* at 1121.

[33] In this regard, this case is like *Cooper Industries*, in which this Court declined to address this issue. *See Cooper Industries*, *supra*, 543 U.S. at 167, n.5.

under section 9607(a)."[34] If not, this would preclude the availability of a contribution claim under § 113(f)(1); additionally, the lack of a settlement would preclude any application of § 113(f)(3)(B); and finally, according to the Government, the order-recipient's likely status as a liable party would render § 107(a)(4)(B) unavailable. Thus, under the Government's reading, one who enters into either a judicial or administrative settlement with EPA would have a contribution claim under § 113(f)(3)(B), but one to whom EPA issues a unilateral order would have no claim at all.[35] It seems highly unlikely that Congress would intend for EPA's choice as to how to exercise its enforcement discretion to have such drastic consequences.[36]

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[34] Section § 122(g)(1) suggests as much by establishing a dichotomy between "administrative or civil action under section 9606 or 9607." 42 U.S.C. § 9622(g)(1). *See also BP America Production Co. v. Burton*, 127 S.Ct. 638 (2006) (deeming an administrative order not to be an "action" under the Mineral Leasing Act).

[35] While a ruling in the Government's favor would lead to these consequences, a ruling affirming the lower court's result (*i.e.*, that those who voluntarily clean up sites have cost-recovery claims despite their own potential liability) would not necessarily imply that those who clean up pursuant to unilateral orders also have cost-recovery claims. Again, this Court need not reach that issue.

[36] The jarring nature of this anomaly is brought into focus when one considers that, given the frequent applicability of joint and several liability under CERCLA, *see, e.g., O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990), EPA often would have the power to issue a unilateral order requiring one out of perhaps dozens of PRPs to implement an entire remedy, even though these remedies often involve tens of millions of dollars in response costs. Under EPA's reading, the recipient of such an order would have no way to spread the costs of such a cleanup among the other jointly and severally liable parties. EPA's settlement leverage, which has always been great under the statute, *see, e.g.*, 42 U.S.C. § 9607(c)(3), will be truly breathtaking if it can threaten at any time to issue any jointly and severally liable PRP a unilateral order depriving it of any recourse against other PRPs.

3. CERCLA's Purposes Argue Strongly in Favor of Reading § 107(a)(4)(B) to Allow Those Who Voluntarily Remediate Sites to Seek Cost Recovery

As the Government concedes, CERCLA's central purposes are to promote cleanup at contaminated sites and to ensure that those deemed responsible bear the costs of those cleanups. U.S. Brief, at 2. And as this Court recognized in *Key Tronic*, in the private-party context these two purposes are linked. See 511 U.S. at 819, n.13 (noting that the purpose of providing for private-party cost recovery was "to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others").

The Government seems to believe that Congress sought only to promote "government sponsored cleanup" under government-sanctioned settlements. U.S. Brief, at 36-37 and 39. This view ignores both the text of § 107(a)(4)(B), which expressly allows any nongovernmental entity to recover response costs, and its legislative history. Additionally, it discounts the pre-SARA case law, the absence of any indication, textual or otherwise, that SARA intended to repeal private-party cost recovery, and twenty years of unanimous, post-SARA case law recognizing the right of private parties to bring these claims (albeit under various legal theories).[37]

In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), a plurality of this Court recognized the vital role that private-party cleanups play under CERCLA:

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[37] The first exception to this chain of case law was in *DuPont*, *supra*, 460 F.3d at 539, in which the Third Circuit became the only one of the four Circuits that have reconsidered the cost-recovery issue since *Cooper Industries* to adhere to its earlier view denying these plaintiffs a claim. *Compare Atlantic Research*, 459 F.3d at 834-835, *Consolidated Edison*, 423 F.3d at 100, and *Metropolitan Water*, 473 F.3d 834-837.

> Congress did not think it enough . . . to permit only the Federal Government to recoup the costs of its own cleanups of hazardous-waste sites; the Government's resources being finite, it could neither pay up front for all necessary cleanups nor undertake many different projects at the same time. Some help was needed, and Congress sought to encourage that help by allowing private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs involved from other potentially responsible parties.

Id. at 21-22.

By any measure, Congress's plan to promote cleanup by empowering proactive parties to spread some of the cleanup costs to other PRPs has been effective. According to our research, nearly 60 percent of the CERCLA cases litigated in the federal courts between 1995 and 2000 involved cleanups that the government would characterize as "unsupervised," U.S. Brief, at 39; *i.e.*, they were not the result of either government-generated lawsuits or judicial or administrative settlements of the type that would trigger either § 113(f)(1) or (f)(3)(B).[38] Even this Court has had significant exposure to such cases: *Key Tronic*, *Cooper Industries* and this case all involved cleanups that would not meet the Government's threshold.[39] The Government's interpretation would undermine CERCLA's cost-sharing goal in such cases.

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[38] As indicated in n.12, *supra*, we reviewed all decisions CERCLA decisions reported in Westlaw that were decided between 1995 and 2000. We analyzed these decisions, which involved 364 contaminated sites, specifically to see whether a § 113(f)-triggering action had occurred. In 210 of the cases, one had not. This does not mean that these cleanups were unsupervised. In the majority of these cases, the party cleaning up the site had worked under the informal supervision of a State agency.

[39] *See Key Tronic*, 511 U.S. at 812 (Key Tronic was seeking, *inter alia*, $1.2 million for costs it had incurred without any consent agreement or lawsuit pending against it); *Cooper Industries*, 543 U.S. at 164 (Aviall had spent $5 million despite the absence of any "judicial or

Even this picture, however, does not begin to convey the full impact that CERCLA has outside of the realm of what the Government considers "supervised" cleanups. As the authors of a leading casebook have noted, while EPA and the States focus on the highest-priority sites, private parties often deal with smaller-scale contamination problems. Miller and Johnston, The Law of Hazardous Waste Disposal and Remediation, 2d ed., p. 564 (Thompson/West, 2005).[40] These private-party actions "have the effect of dramatically expanding the scope of the CERCLA program." *Id.* at 563. While responsibility for the vast majority of these cleanups may be resolved without resort to litigation, CERCLA still drives them; the underlying threat of a CERCLA action is what typically convinces those responsible to come to the table. As the author of the leading environmental treatise wrote 13 years ago,

> . . . In thirteen short years, [CERCLA] has thoroughly revolutionized commercial property management and exchange in the United States. More than any other single enactment, section 107 has brought environmental law into the blue-ribbon law firms of every major city. In no small way, this statute has transformed the practice of environmental law from fringe novelty to mainstream reality.

William H. Rodgers, the Seven Statutory Wonders of U.S. Environmental Law: Origins and Morphology, 27 Loy. L.A. L. Rev. 1009, 1012 (1994).

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administrative measures to compel cleanup"); and *Atlantic Research*, 459 F.3d at 829 (Atlantic engaged in a voluntary cleanup).

[40] EPA can only undertake "remedial action" at sites that are on the National Priorities List, a list of the most contaminated sites in the country. See 40 C.F.R. § 300.425(b). There are currently approximately 1,246 sites on the NPL. *See* http://cfpub.epa.gov/supercpad/cursites (search conducted on April 2, 2007). By contrast, there are an estimated 130,000 to 425,000 potential sites contaminated with hazardous waste. *See* U.S. General Accounting Office, *Extent of Nation's Potential Hazardous Waste Problem Still Unknown* 3 (Dec. 1987).

The Government's reading of § 107(a)(4)(B) would thwart both of CERCLA's central purposes. By reducing the ability of private parties to spread the costs of their potential cleanup measures among other responsible parties, the Government's interpretation would dramatically reduce their incentive to engage in these cleanup activities, and fewer cleanups would occur. Where private parties did voluntarily undertake cleanup measures, the Government's interpretation would preclude them from requiring others to bear their fair share of these cleanup obligations.

Of the four Courts of Appeal that have reconsidered private-party cost recovery in the wake of *Cooper Industries*, three, including the court below, have reversed course to find that even potentially-liable parties have such claims. *See Atlantic Research*, 459 F.3d at 834-835, *Consolidated Edison*, 423 F.3d at 100, and *Metropolitan Water*, 473 F.3d 834-837; *but see DuPont*, 460 F.3d at 539. The courts have taken this remarkable step because, upon reconsideration, they have realized that the existence of such a right is both commanded by the statute's language and fully consistent with its purposes. As a matter of first impression, this Court should reach the same conclusion.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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APPENDIX

APPENDIX

Description of *Amici Curiae*

The Natural Resources Defense Council is one of the nation's leading environmental organizations, with 1.2 million members and supporters. Its mission is to safeguard the Earth: its people, its plants and animals and the natural systems on which all life depends.

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No. 06-562

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

-v.-

ATLANTIC RESEARCH CORPORATION,
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* THE CITY OF NEW YORK IN SUPPORT OF RESPONDENT

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April 5, 2007

QUESTION PRESENTED

The City of New York ("City") voluntarily investigates and remediates contamination caused by third-parties in order to protect its citizens and the environment as well as to revitalize brownfield properties. The main question the City addresses is whether the City, in all circumstances, is entitled to recover its voluntarily incurred response costs from responsible parties under the Comprehensive Environmental Response, Compensation, and Liability Act.

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INTERESTS OF *AMICUS CURIAE*

Amicus curiae the City of New York ("City") submits this brief in support of respondent Atlantic Research Corporation seeking affirmance of the United States Court of Appeals for the Eighth Circuit's decision in *Atlantic Research v. United States*, 459 F.3d 827 (8th Cir. 2006).[1]

The City, a political subdivision of the State of New York, is actively involved in the investigation and remediation of contaminated properties throughout its five boroughs. While the City conducts some of these activities pursuant to consent orders with the State of New York and less often, with the United States, the City also conducts voluntary cleanups of properties contaminated by third-parties. The City's motivation in remediating this contamination is twofold. First, the City is committed to abating hazardous contamination that poses a threat to its citizens and the environment. Second, the City remediates brownfields in order to foster economic growth by returning these underutilized properties to productive uses. The private causes of action available under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, are critical to both of these goals.

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[1] Pursuant to Rule 37.6 of this Court, the City represents that counsel for the City authored this brief in its entirety and that no person or entity other than the City or its representatives made any monetary contribution to the preparation or submission of this brief. Counsel for petitioner and respondent have consented to the filing of this brief, and letters reflecting their consent are submitted to the clerk's office with this brief.

With respect to the City's first goal, the City uses CERCLA to recover costs associated with remediating contamination that threatens human health or the environment and is caused by a third-party. For example, in 1997, a City contractor was performing routine work at a rail facility that the City has owned since the 1970s and leases to private entities. In the course of performing this work, the contractor discovered over a dozen buried drums of chlordane, a pesticide that has been banned by the United States Environmental Protection Agency (EPA), as well as extensive polyaromatic hydrocarbon (PAH) contamination in soils on the site. Both of these compounds pose a risk to human health and the environment.

In accordance with State regulatory requirements, the City notified the New York State Department of Environmental Conservation (NYSDEC) of the situation and its plans to abate the contamination. NYSDEC agreed with the City's planned course of remedial action, but did not order the City to conduct a cleanup or directly supervise it. The City voluntarily conducted the investigation and remediation of the buried hazardous waste with its own funds.

The City then brought a CERCLA claim in the Eastern District of New York against the corporation that leased the land from the City as well as against its chief executive officer. As further explained in the district court's decision on the City's motion for summary judgment, the City had facts supporting its claim that the drums of chlordane had been surreptitiously buried by the tenant on the City's property. See *City of N.Y. v. N.Y. Cross Harbor R.R. Terminal Corp.*, Case No. 98-7227, 2006 U.S. Dist. LEXIS 4238 (E.D.N.Y. 2006). The City

was eventually able to recover a substantial sum of its response costs through settlements with the defendants.

A second example where the City voluntarily incurred response costs in order to abate a serious threat to its environment and then brought a CERCLA claim to recover its costs is *City of New York v. Chemical Waste Disposal Corp.*, 836 F. Supp. 968 (E.D.N.Y. 1993). The defendants in that case were found to be pumping large quantities of hazardous chemicals through a floor drain and into the City's sewer system. The City incurred substantial costs voluntarily abating this illegal and dangerous activity fourteen months before EPA brought its own claim against the defendant.

These two cases exemplify how voluntary response actions, coupled with attendant private cost recovery claims, can be used to effectuate environmental remediation and responsible party liability, two of CERCLA's main goals. However, in both of these cases, the City may have qualified as a potentially responsible party (PRP) and thus would likely be unable to bring similar claims in the future if the petitioner's argument is accepted. Thus, the City is an *amicus* in this proceeding because it has an interest in ensuring that it can continue to bring litigation that benefits its citizens and its environment.

In addition to helping the City protect its environment, CERCLA claims can also play an important role in improving the City's economy. New York City, like many municipalities throughout the country, is burdened by a large number of brownfield properties. CERCLA defines a brownfield as real property "the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous

substance, pollutant, or contaminant." 42 U.S.C. § 9601(39)(A). Brownfields are synonymous with urban blight, producing little tax revenue and few jobs, if any. Brownfield redevelopment increases the local tax base, facilitates job growth, utilizes existing infrastructure, takes development pressures off of undeveloped land, and improves and protects the environment. EPA estimates that there are currently 450,000 brownfields in the United States and actively promotes the cleanup and reinvestment in these properties.

In New York City, brownfield properties are often clustered together in historically lower income neighborhoods or in former manufacturing districts along the City's waterfront. The economic viability of these manufacturing districts – which were once the backbone of the City's economy – has dramatically declined in recent years, as evidenced by a fifty percent reduction in the number of manufacturing jobs in the City since the early 1960s. In addition, many lands along the City's waterfront were created in the nineteenth and early twentieth by filling wetlands with contaminated construction and demolition debris, incinerator ash, and other byproducts of an industrialized society. This so-called "historic fill material" is ubiquitous throughout certain areas of the City and is prohibitively expensive to remove and dispose of properly.

The potential environmental conditions at these properties ward off prospective developers, who fear expensive remediation costs and the possibility of an enforcement action by state or federal authorities. The City has a broad strategy to revitalize these properties including, but not limited to, applying for federal and state funding, providing information and assistance to community and business groups working on brownfields redevelopment,

and, perhaps most importantly, voluntarily investigating and remediating brownfield sites.

A good example of the City's work in this area is its ongoing investigation and remediation of an approximately 200-acre tract of land on the Hunts Point Peninsula, which is located in the borough of the Bronx. Between the 1920s and 1950s, the Consolidated Edison Company of New York (Con Edison) used a significant portion of this land for a manufactured gas plant (MGP) operation. MGPs were facilities that existed throughout the country during most of the nineteenth and twentieth centuries. These facilities produced natural gas for use in home heating and lighting by gasifying coal, oil, and other feedstocks. See generally New York State Department of Environmental Conservation, *The MGP Program at the NYSDEC* (April 2007) <http://www.dec.state.ny.us/website/der/mgp/dec_mgp.html>.

The MGP process created two distinct types of hazardous wastes: coal tar, which is an oily liquid with high levels of PAH compounds, and purifier waste, which contains cyanide. *Id.* In the era before environmental regulation, many MGP plant operators would directly dispose of this material on the grounds of the plant. The NYSDEC estimates that there are roughly 300 former MGP sites in New York state alone, with several dozen in New York City. *Id.* Because many of these MGPs ceased operations decades ago, these sites are often hidden and have unwittingly been developed over the years into a range of industrial, commercial, and even residential uses. *Id.*

The City purchased the site of the former Hunts Point MGP in the late 1960s and early 1970s and, while the City was able to develop some of the property for

commercial and industrial purposes, dozens of acres at the site sat idle for decades due to economics and, ultimately, its potential environmental conditions. In the late 1990s, the City began carrying out a comprehensive plan to revitalize the idle acreage at Hunts Point by entering into several separate voluntary cleanup agreements (VCAs) for the site with the NYSDEC.

Con Edison, the PRP, was not a party to the VCAs; however, via a companion agreement, Con Edison reimbursed the City for some of the investigative and remedial costs associated with the MGP waste. This agreement was prompted, at least in part, by the prospect of the City bringing a cost recovery action against Con Edison under CERCLA. Thus, even though a lawsuit was not filed, the threat of a private party CERCLA cost recovery action prompted a former owner and operator to offer the funding that led to the successful redevelopment of this large brownfield site. In 2005, the historic Fulton Fish Market was moved from lower Manhattan into a state-of-the-art new facility at the site of the former MGP, bringing 600 jobs and a one billion dollar industry to the Bronx. This positive turnaround may not have occurred had the City not voluntarily remediated the 28,000 tons of coal tar and 8,000 tons of purifier waste fouling the site. This accomplishment was recognized in 2006 when the project was awarded the Phoenix Award for Excellence in Brownfields Redevelopment for EPA Region 2.

While the City's accomplishments are noteworthy, a staggering amount of work remains to be done, both in abating threats to the environment and revitalizing brownfields. It is currently estimated that there are approximately 5,700 acres of contaminated land in New York City. The City's need to remediate these properties is made more urgent by the fact that the City's population is

projected to grow by another 1 million people by 2030, thus increasing the need for livable and usable space. If the City is no longer permitted to recover its voluntarily incurred response costs from responsible parties under CERCLA, addressing these issues will be made substantially more difficult and expensive. Therefore, the City has a strong interest in arguing for this Court to uphold the right of all parties, whether they be innocent or potentially responsible, to recover their response costs under Section 107(a)(4)(B) of CERCLA.

SUMMARY OF ARGUMENT

Since 1980, CERCLA has unalterably stated that responsible parties are liable for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan" and "any other necessary costs of response incurred by any other person consistent with the national contingency plan . . . ." 42 U.S.C. 9607(a)(1)-(4)(A)(B). This broad net of both public and private liability promotes CERCLA's twin goals of "encouraging expeditious, voluntary environmental cleanups while holding responsible parties accountable for response costs that their past activities induced." See *Metropolitan Water Reclamation Dist. v. North Am. Galvanizing & Coatings*, 473 F.3d 824, 836 (7th Cir. 2007). With respect to private cost recovery claims, this Court recognized over a decade ago that Section 107 "unquestionably provides a cause of action for private parties to seek recovery of cleanup costs." See *Key Tronic Corp. v. United States*, 511 U.S. 809, 818 (1994).

In *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 165-68 (2004), this Court clarified that suits for contribution brought under Section 113(f)(1) of

CERCLA are only available to persons that have first been sued under either Section 106 or Section 107. Since the Court's decision, three courts of appeal have held that the language and intent of CERCLA clearly allow any person, including PRPs, to bring cost recovery claims under Section 107(a)(4)(B). See *Consolidated Edison Co. of New York v. UGI Utilities, Inc.*, 423 F.3d 90, 99-100 (2d Cir. 2005); *Atlantic Research*, 459 F.3d at 834-35 (8th Cir. 2006); *Metropolitan Water Dist.*, 473 F.3d at 834-36; see also *Schaeffer v. Town of Victor*, 457 F.3d 188, 199-201 (2d Cir. 2006) (separate three-judge panel of the Second Circuit reaffirming the holding and analysis set forth in *Consolidated Edison of New York*). Only one court of appeals has since ruled that Section 107(a)(4)(B) actions are only available to innocent parties and that PRPs who voluntarily incur response costs have no remedy under CERCLA. See *E.I. Dupont De Nemours & Co. v. United States*, 460 F.3d 515, 530 (3d Cir. 2006). The interpretation given CERCLA by the United States Courts of Appeals for the Second, Seventh, and Eighth Circuits is the correct one, and should be affirmed by this Court.

These courts of appeals all recognized the importance of voluntary remedial actions and private cost recovery claims as an essential part of the CERCLA statutory framework. The petitioner's arguments to the contrary are not only disconnected from CERCLA's language and purpose, but also fail to consider *who* these so-called PRPs are, and *how important* voluntary cleanups are to remediating this country's contaminated land.

ARGUMENT

I

SECTION 107(a)(4)(B) OF CERCLA CREATES A PRIVATE COST RECOVERY CLAIM FOR ANY PERSON WHO INCURS RESPONSE COSTS

Petitioner's position that CERCLA does not allow PRPs to bring Section 107(a)(4)(B) claims is based upon several misinterpretations of the statute, a number of which are addressed below.

A. 107(a)(4)(B) is a Distinct Cause of Action from 113(f)(1)

Petitioner contends that PRPs are only permitted to bring contribution actions under Section 113(f) regardless of whether or not they voluntarily incurred response costs at a site. However, as this Court noted in *Cooper Industries*, the causes of action under 107(a)(4)(B) and 113(f) are "clearly distinct," and available to plaintiffs who have incurred different types of harm. 543 U.S. at 163 n. 3; see also *Consolidated Edison of New York*, 423 F.3d at 99 (stating that Sections 107(a) and 113(f)(1) embody mechanisms for "cost recovery available to persons in different procedural circumstances").

As recognized by the Eighth Circuit, Section 107(a) claims are available to any plaintiff who actually incurs response costs at a site, i.e., voluntarily expends money investigating and remediating a site contaminated by hazardous waste without being prompted by a Section 106 or 107 enforcement action by the state or federal

government. See *Atlantic Research*, 459 F.3d at 835. In contrast, plaintiffs who have been the subject of a 106 or 107 actions are only eligible to pursue contribution actions under Section 113(f). *Id.*

This interpretation of CERCLA is straightforward as it rightly distinguishes between parties who act voluntarily and those who do not. Parties who voluntary take on cleanup responsibilities incur substantial, upfront risks by investigating and remediating contamination at a site before the extent of the contamination is fully delineated. In contrast, parties who are subject to an enforcement action take on no such risk, and in many instances, are merely paying money while someone else is doing the actual work. As analogized by the Court of Appeals for the Second Circuit, if a "party expends funds out of obligation under an administrative or court order or final judgment, its liability may be similar to that of a tort feasor's liability for the doctor's bills of the injured party. Payment by the tort feasor does not mean it has incurred doctor's bills itself." See *Consolidated Edison of New York*, 423 F.3d at 101 (internal citations omitted); see also *United States v. Taylor*, 909 F. Supp. 355, 365 (M.D.N.C. 1995) (stating when a party "does not conduct its own cleanup, it has not incurred recovery costs").

Thus, any party who has incurred actual response costs at a site – as opposed to costs incurred as a result of litigation – should be entitled to cost recovery under Section 107(a)(4)(B).

B. Interpretation of the Phrase "Any Other Person"

Petitioner's claim that the use of the phrase "any other person" in Section 107(a)(4)(B) was intentionally used by Congress to restrict private cost recovery claims to

innocent parties, is refuted by the Eighth Circuit's more logical interpretation that "'any other person' means any person other than the statutorily enumerated United States Government or a State or an Indian Tribe." See *Atlantic Research*, 459 F.3d at 835. The Eighth Circuit's position is firmly supported by a plain reading Section 107(a)(4)(A) and (B) and an analysis of CERCLA's definition of the word "person." See 42 U.S.C. § 9601(21).

CERCLA defines "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, *United States Government, State*, municipality, commission, political subdivision of a State, or any interstate body." *Id.* § 9601(21) (emphasis added). Given that the definition of person includes both the United States and the States, if Section 107(a)(4)(B) did not use the word "other" to qualify the word "person," CERCLA would provide two separate avenues for the United States and the States to bring cost recovery actions: Section 107(a)(1)(A) – in which they are specifically mentioned – and 107(a)(4)(B) – in which they are included only by virtue of the statutory definition of "person." Such a result would be illogical as Congress intended the two causes of action to have different burdens of proof. See *Carson Harbor Village, Ltd. V. County of Los Angeles*, 433 F.3d 1260, 1265 (9th Cir. 2006); *United States v. E.I. Dupont De Nemours & Co.*, 432 F.3d 161, 178 (3d. Cir. 2005).

Thus, it is likely that, when adding the word "other," the authors of CERCLA merely recognized the definitional overlap caused by the use of the word "person" in Section 107(a)(4)(B) and decided to provide a simple clarification. However, as petitioner admits, "the legislative history does not shed light on that particular change." Petitioner's Brief on the Merits (Pet. Brief), at 19.

The lack of legislative history surrounding this change supports the interpretation that this change was intended to be minor, and not, as petitioner contends, an exclusion of an entire class of private CERCLA plaintiffs from the ability to bring a cost recovery action. See, e.g., *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 891 (9th Cir. 1986) (finding no basis for granting the "ordinary word [other]" a critical meaning in interpreting CERCLA 107(a)(4)(B) when it has "an alternate, more plausible purpose"). Thus, the interpretation of the phrase "any other person" by the Eighth Circuit should be upheld.

C. Private Cost Recovery Claims Brought by PRPs Will Not Create A Disincentive to CERCLA Settlements

Petitioner warns that allowing private cost recovery actions by PRPs under Section 107(a)(4)(B) will discourage settlements with the state and federal government and thus interfere with a key objective of CERCLA. It is without question that an objective of CERCLA and the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, was to encourage PRPs to quickly enter into settlement agreements with the United States and the states in order to avoid protracted litigation. See *United Technologies v. Browning-Ferris*, 33 F.3d 96, 102 (1st Cir. 1994). To promote this goal, CERCLA offers settling PRPs with contribution protection "for claims for contribution regarding matters addressed in the settlement [of a 106 or 107 claim]." *See* 42 U.S.C. 9613(f)(2). Section 113(f)(2) also implicitly threatens parties with the prospect of disproportionate liability if they do not enter into a settlement agreement. Petitioner's argument, however, that 107(a)(4)(B) claims brought by PRPs will impede the

statute's promotion of settlements, is legally flawed and premised on unrealistic, hypothetical situations.

First, it is wrong for the petitioner to assert that 107(4)(B) claims brought by PRPs will uniquely interfere with the contribution protections offered by Section 113(f)(2). A settling party is equally threatened by post-settlement cost recovery claims brought by innocent parties because Section 113(f)(2) offers no protection from these claims either. See 42 U.S.C. 9613(f) (offering liability protection "for claims for contribution regarding matters addressed in the settlement").

To illustrate, a common issue at inactive hazardous waste sites is offsite migration of onsite contamination via the groundwater or other media. These migrating contaminates have the potential to contaminate the soil and groundwater of adjacent properties owned by individuals who have nothing to do with the activities on the inactive hazardous waste site. As the petitioner admits, these innocent landowners have the right to recover any response costs under Section 107(a)(4)(B). See Pet. Brief. 16.

Thus, if a PRP enters into a settlement with the United States or a state with regard to onsite contamination, they still face the prospect of liability from cost recovery claims brought by these innocent third-parties. Similarly, under certain circumstances, they could face similar claims from subsequent purchasers of the property. *See* Pet. Brief, at 16. Thus, the threat of post-settlement liability and a lack of full contribution protection will not be eliminated by preventing PRPs from recovering their response costs under Section 107(a)(4)(B).

Second, petitioner's argument that PRPs will forego settlement with the United States or a state in order to take advantage of the joint and several liability offered by a

Section 107(a) claim is flawed because it would be unusual, if not impossible, for one PRP to actually obtain joint and several liability against another. See Pet. Brief at 37. As the Second Circuit has made clear in *Consolidated Edison of New York* "a person sued under Section 107(a) . . . [may bring] a counterclaim under Section 113(f)(1) for offsetting contribution against the plaintiff volunteer who, if sued, would be liable under Section 107(a)." See *Consolidated Edison of New York*, 423 F.3d at 100, n. 9. This right of contribution is available whether or not the United States or a State has brought an enforcement action. See 42 U.S.C. § 9613(f)(1) (stating that "nothing in this subsection shall diminish the right of any person to bring an action for contribution the absence of a civil action under 9606 or 9607 of this title.")

While petitioner complains that this framework shifts the burden onto the defendant PRP for bringing a counterclaim to avoid joint and several liability, the burden is minimal and not any more burdensome than having to assert contributory negligence to avoid joint and several liability in a negligence claim. This minimal burden is further reduced by the fact that 113(f) counterclaims are not compulsory. See *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 748 (7th Cir. 1993) ("The statute is explicit that a counterclaim for response costs is not compulsory . . . a result consistent with general law"). Thus, given that the chance of obtaining joint and several liability against another PRP is slim to nil, it is unlikely that a PRP would choose to bring a 107(a)(4)(B) action over obtaining the liability release and contribution protection offered by a settlement with the United States or a state.

Finally, CERCLA's goal of encouraging prompt settlements with the United States or the states only comes into play when these entities are actively enforcing against

the PRPs at the site. As recognized by the Seventh Circuit in *Metropolitan Water District*, the petitioner's concerns regarding "diminished settlement leverage" do not exist when the United States or the states "are not in the picture" and thus have "no reason to pursue a settlement." See *Metropolitan Water Dist.*, 473 F.3d at 837. As evidenced by the City's experiences in conducting voluntarily cleanups as discussed above, it is often the case that once a PRP takes the lead in conducting a response action, there is no need for the EPA or a state regulatory agency to bring an enforcement action against the self-motivated PRP.

In the *Cross Harbor* case, for instance, the City notified the NYSDEC of its plan and then spent its own resources investigating and remediating the hazards on its property. In such circumstance it would be illogical, and a great waste of governmental resources, to do as the petitioner suggests and "enter into a settlement with the federal or state government." Pet. Brief, at 43. Such a statement wrongly assumes that the individual states and federal government have the desire or the resources to bring CERCLA actions in every instance of hazardous contamination that occurs in this country, even when another entity is ready and willing to conduct the cleanup. Moreover, if the states or federal government decline to take action, a PRP has no recompense for his voluntary action due to the lack of involvement of a federal or state enforcer.

Additionally, where the states and federal government are absent in a cleanup, CERCLA's goal of achieving prompt settlements can still be carried out by private parties. Almost all of the CERCLA actions that the City has brought or planned have resulted in some form of settlement with the other PRPs. Most notably, in *City of New York v. Cross Harbor*, the City was able to obtain a

settlement with several defendants for hazardous waste response costs that it incurred at its rail facility. Similarly, at the Hunts Point site, the City was able to use CERCLA as a key negotiating point with the PRP in order to achieve an agreement. These examples of agreements or settlements arising out of private cost recovery actions debunk the hypothetical concerns offered by the petitioner in support of its argument.

II

LIMITING COST RECOVERY CLAIMS TO NON-PRPS WILL EXCLUDE FAULTLESS PRPS FROM BRINGING COST RECOVERY ACTIONS

Because this case centers around the right of PRPs to bring claims under Section 107(a)(4)(B) of CERCLA, it is important for this Court to consider *who* can qualify as a PRP under CERCLA and how broadly that term has been interpreted over the years by federal courts. It is also important for this Court to consider whether the language of section 107(a)(4)(B) supports petitioner's contention that bona fide purchasers or other parties who qualify for CERCLA defenses may bring cost recovery claims while PRPs cannot.

A. The Broad Scope of PRP Status

In general, CERCLA sets out four categories of persons who are liable for response costs: (i) current owners and operators; (ii) past owners and operators who owned or operated the facility at the time of the disposal of hazardous substance; (iii) persons who arrange for hazardous substance to be disposed of at the facility where

there is a release; and (iv) persons who transport hazardous substances to a facility where there is a release. See 42 U.S.C. 9607(a)(1)-(4). Congress intentionally crafted these categories of covered persons to be broad and the federal courts have broadened them even further by interpreting CERCLA as requiring no finding of causation or fault. See *Farmland Industries, Inc. v. Morrison-Quirk Grain Corp.*, 987 F.2d 1335, 1339 (8th Cir. 1993); *United States v. Alcan Corp.*, 990 F.2d 711, 721 (2d Cir. 1993); *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985).

Over the years, federal courts have interpreted CERCLA's provisions as granting PRP status to individuals who did not directly cause or participate in the original release or disposal of contamination at the site. See, e.g., *Westfarm Assocs. v. Wash. Suburban Sanitary Comm'n*, 66 F.3d 669, 675-80 (4th Cir. 1995) (holding that a municipal operator of a sewer system is liable for the acts of a third-party that discharges hazardous waste into the system); *Western Props. Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 689-90 (9th Cir. 2004) (holding that non-polluting landowner of a contaminated site is a PRP under CERCLA); *Redwing Carriers v. Saraland Apts.*, 94 F.3d 1489, 1512 (11th Cir. 1996) (holding that operator liability can occur when a party disperses contaminated soil during the course of grading and filling a construction site); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573-74 (5th Cir. 1988) (holding that developers who graded and improved contaminated property could be subject to both operator and arranger liability); and *Elementis Chems., Inc. v. T H Agric. & Nutrition*, L.L.C., 373 F. Supp. 2d 257, 268-69 (S.D.N.Y. 2005) (holding that current owner who undertakes response action is a PRP regardless of whether the owner causes the release). These cases and others show that CERCLA

liability has been held to attach to innocent and unassuming entities who engage in normal activities such as readying what turns out to be contaminated site for development or even operating a municipal sewer system.

That these non-polluting PRPs can be held liable under CERCLA for their involvement with the contaminated site is not necessarily inconsistent with the statute's language or intent. What is inconsistent, however, is petitioner's argument that, by virtue of their legal status as PRPs, these otherwise innocent parties are barred from recovering their response costs from the individuals who actually caused the contamination. The petitioner's interpretation that PRP status bars an action under 107(a)(4)(B) would result in inequities to these non-polluting PRPs, especially in urban areas where environmental conditions often remain concealed long after the contaminating activities on the site have ceased.

A telling example of how PRP status is too easily achieved under CERCLA in urban areas is evidenced by the continued finding of new MGP contamination throughout New York City and State. Although the NYSDEC has been aggressively attempting to identify new MGP sites for years now, it is still working to identify how many other sites may exist in New York, and where they are located. At least three times in the past ten years, the City has uncovered previously unknown MGP contamination on properties it owned well before the enactment of CERCLA. For at least one of these sites, nothing in the property records even indicated that MGP contamination was present on the site.

Yet on all of the sites, the City (or other private owners) could be considered a PRP merely because it is the owner at the time the previously hidden contamination is

identified. Moreover, MGP contamination is only one example of hidden environmental conditions that may be discovered in the course of a City development project. To bar the City from bringing cost recovery actions against prior owners, operators, arrangers, and transporters, merely because the City owns or has used the land where the contamination is found, would expose the City and other similarly situated municipalities to extensive liabilities.

These potential liabilities would have a chilling effect on developing properties that may be contaminated because any developer, either the City or a private entity, would have no federal claim to offset the oftentimes extensive investigation and remedial costs unless, in each instance, the United States or the state brings an enforcement action. As recognized by the Second Circuit in *Consolidated Edison of New York*, "[w]ere this economic disincentive in place, such parties would likely wait until they are sued to commence cleaning up any site for which they are not exclusively responsible because of their inability to be reimbursed for cleanup expenditures in the absence of a suit." 423 F.3d at 100. This chilling effect is directly contrary to CERCLA's intent of encouraging parties to remediate contaminated properties.

B. Nothing In Section 107(a) Creates A Distinction Between Innocent Landowners or Bona Fide Purchasers and PRPs

Although the petitioner claims that PRPs as enumerated under Section 107(a)(1)-(4) have no right to bring a claim under Section 107(a)(4)(B), petitioner does claim that certain types of landowners who might otherwise meet the definition of a PRP should still be allowed to bring Section 107(a)(4)(B) claims if they can qualify as either an "innocent landowner" or a "bona fide purchaser"

under the statute. Petitioner's attempt to create a distinction that some, but not other, PRPs can bring claims under the Section 107(a)(4)(B) is not supported by the statutory text.

The "innocent landowner" and "bona fide purchaser" provisions of CERCLA cited by the petitioner are clearly intended to be affirmative defenses against 107(a) claims, not elements of the claims themselves. See 42 U.S.C. 9601(35), 9601(40), 9607(b) and 9607(r)(1). Nothing in the statutory text indicates that these provisions are intended to be used as methods by which PRPs can establish standing to bring a claim under 107(a)(4)(B). Indeed, while it is true that certain courts of appeal have read these sections consistent with the petitioner's view, see, e.g., *Western Props. Serv. Corp*, 358 F.3d at 690 n. 53, the language of these sections is expressly used in terms of establishing affirmative defenses. For example, Section 107(b) is expressly entitled "Defenses," and Section 107(r)(1) states that a bona fide purchaser shall "not be held liable as long as [he] does not impede the performance of a response action or natural resource restoration." See 42 U.S.C. 9607(b) and 9607(r)(1). Thus, while the petitioner criticizes the Eighth Circuit of judicially inferring a new cause of action for PRPs who incur response costs, petitioner is proposing that this Court recognize distinctions that plainly do not exist in Section 107(a)(4)(B).

Furthermore, accepting petitioner's argument would require courts to make detailed factual determinations whether a plaintiff meets the detailed standards for an "innocent landowner" and "bona fide purchaser," an evaluation that Section 107(a)(4)(B) does not envision. It is also likely that, at least in some cases, the threshold issue of whether the plaintiff is a PRP will not be decided until the case moves forward to trial. This would result in great

judicial inefficiencies as many CERCLA cases often take at least several years to reach that point.

This unwieldy framework that would have parties argue whether a plaintiff is a PRP as a threshold issue will further complicate the already muddied world of CERCLA litigation. The statute does not require it and it thus should be rejected. Instead, a far more clear and workable solution would be to interpret the statute as it is written: allowing any person who has incurred response costs to bring a Section 107(a) cost recovery claim.

III

VOLUNTARY RESPONSE ACTIONS ARE CRITICAL TO STATE AND FEDERAL EFFORTS TO ADDRESS HAZARDOUS CONTAMINATION

The petitioner contends that CERCLA was not intended to foster voluntary remediation of sites but instead intended to encourage "negotiated settlements leading to supervised cleanups." Pet. Brief, at 41. Petitioner's argument fails to acknowledge, however, that over the past fifteen years the federal and state governments have moved significantly away from administrative settlements for moderately contaminated sites and instead have actively encouraged parties to voluntarily remediate the contamination. The substantial gains made by these voluntary remedial programs could be lost if volunteers are now forced to endure the financial burden they believed would be offset by their ability to bring CERCLA claims.

In the late 1980s, limited state and federal resources, coupled with trepidation in the private sector for taking on expensive cleanup obligations, led to a hindrance

of cleanups at brownfields and other contaminated sites. See United States General Accounting Office, *Brownfield Development: Stakeholders Report that EPA's Program Helps to Redevelop Sites, but Additional Measures Could Complement Agency Efforts*, GAO-05-94, at 10 (December 2004). In response, "some states began to establish voluntary cleanup programs that allow private parties to identify and clean up sites, use less extensive administrative procedures, and obtain some relief for future state liability for past contamination." *Id.* The programs also proved beneficial to the federal and state governments because encouraging voluntary cleanups by PRPs allowed EPA and state enforcement agencies to focus their limited resources on the most seriously contaminated sites. See United States General Accounting Office, *State Voluntary Cleanup Programs Provide Incentives to Encourage Cleanups*, GAO/RCED-97-66, at 14 (April 1997).

In 1995, EPA began authorizing states to use federal funds to develop voluntary cleanup programs. *Id.* In November 1996, EPA's Office of Solid Waste and Emergency Response issued a guidance document entitled "Interim Approaches for Regional Relations with State Voluntary Cleanup Programs." See Memorandum from Elliot Laws, Assistant Administrator, Office of Solid Waste and Emergency Response, and Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance (Nov. 14, 1996) <http://www.epa.gov/brownfields/html-doc/vcp.htm>. In the guidance, which is still in effect today, EPA set out baseline criteria which it employs to evaluate the adequacy of state voluntary cleanup programs. EPA memorializes its acceptance of the state voluntary cleanup program by entering into a Memorandum of Agreement ("MOA") with a state. In return, EPA provides a non-binding promise to avoid taking any enforcement action under 106 and 107 of

CERCLA at sites undergoing a state supervised voluntary cleanup. Since 1996, EPA has entered into MOA's with twenty-three individual states in order to promote their use of voluntary cleanup programs. See Memorandum of Agreement on State Voluntary Cleanup Programs (Mar. 27, 2007) <http://www.epa.gov/brownfields/html-doc/statemoa.htm>.

The federal government's promotion of voluntary cleanup programs became even stronger in 2002 when Congress passed the Small Business Liability Relief and Brownfields Revitalization Act, Pub L. 107-118, 115 Stat. 2356, which, among other things, increased federal funding for these programs and formally dissuaded EPA from taking CERCLA enforcement action at "eligible response sites" that are enrolled in a state program that meets certain criteria. *See* 42 U.S.C. 9601(41)(B)(ii). In large part because of EPA's efforts to promote these programs, all fifty states have some version of a voluntary cleanup program available to both PRPs and non-PRPs.

New York State began its voluntary cleanup program in 1994 and has accepted 762 sites into the program. See New York State Department of Environmental Conservation, *Annual Remedial Programs Report for State Fiscal Year 2005-06*, at 7 (2006) <http://www.dec.state.ny.us/website/der/2006annualreport.pdf>. New York State's voluntary program was such a success that the New York State Legislature codified the program in 2003 and bolstered it by offering innocent and PRP remedial parties tax incentives for voluntarily remediating sites. See generally N.Y. Environmental Conservation Law § 27-1401 *et seq.* (McKinney 2006). The codification of the voluntary program in New York State is indicative of the decided national trend of moving

away from enforcement-based cleanups and expanding voluntary remedial programs.

The City has taken advantage of New York State's voluntary cleanup program to address contamination at a number of complicated sites, most notably the Hunts Point Peninsula in the Bronx. The City has entered into several voluntary cleanup agreements to address various parcels at the 200-acre site. The voluntary cleanup program has offered the City the regulatory flexibility and limited state oversight necessary to complete such an extensive investigation and remediation in a timely and efficient manner. Furthermore, other large public entities such as Con Edison have used New York State's voluntary cleanup program to address MGP contamination at various sites throughout the state. See *Consolidated Edison of New York*, 423 F.3d at 93 (describing Con Edison's use of voluntary cleanup program to investigate and remediate former MGP sites).

In its brief, the petitioner argues that CERCLA was not intended to promote "wholly voluntary, unsupervised, *sua sponte* cleanup" operations but instead encourages PRPs to enter into settlement agreements or consent decrees to resolve their liability at a site. Pet. Brief, at 41-43. The petitioner asserts that PRPs entering into such agreements with the federal or state governments provides the PRP with a right to pursue contribution under Section 113(f)(3)(B). Pet. Brief, at 43 note 18. Importantly, not all voluntary cleanups are "unsupervised" as petitioner suggests, though they certainly require fewer resources of the federal and state government than formal administrative or judicial enforcement actions.[2] Additionally, the

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[2] Petitioner's contention that voluntary cleanups are "unsupervised" implies that such cleanups are performed incorrectly. However, as petitioner fails to recognize, any

petitioner does not address whether voluntary cleanup agreements with state environmental agencies would also provide PRPs with a right of action under CERCLA even though they are not enforcement actions per se. Although it is the City's position that all cleanups, supervised or unsupervised, should give rise to a private cost recovery claim, it is especially important for this Court to recognize that PRPs who perform cleanups pursuant to a voluntary cleanup agreement with a state environmental agency have a private right of action to pursue their response costs under either 107(a)(4)(B) or 113(f)(3)(B). Petitioner's proposal does neither and forces a would-be volunteer to wait and be sued by the United States or a state, before it has any chance of recovery.

If the Court does not make the distinction between supervised and unsupervised voluntary cleanups, PRPs who conduct thorough, government-approved cleanups may lose their right to recover some of their cleanup costs. Indeed, as a result of *Cooper Industries*, several courts have disallowed contributions actions because the PRPs conducted their cleanups pursuant to state approved voluntary agreements rather than former administrative consent decrees or enforcement actions. See, e.g., *Consolidated Edison of New York*, 423 F.3d at 96 and *Differential Development-1994, Ltd. v. Harkrider Distrib.*

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private party that hopes to bring a Section 107(a)(4)(B) claim to recover its costs must conform its cleanup to the rigorous procedures and protocols set forth the National Contingency Plan (NCP). See 40 C.F.R. Part 300 *et seq.* Those who do not are denied recovery under CERCLA. See e.g., *Carson Harbor Village, LTD v. County of Los Angeles, et al.*, 433 F.3d 1260 (9th Cir. 2006). Thus, all private cost recovery actions must meet objective standards promulgated by EPA in order to be successful.

Co., Case No. H-05-3375, 2007 U.S. Dist. LEXIS 1592, *27 -*41 (D. Tex. 2007). A holding that bars PRPs who enter into voluntary cleanup agreements from recovering their response costs would not only be inequitable, but it would effectively eviscerate the gains made by the national shift toward voluntary cleanup programs over "command and control" cleanups. Thus, this Court should recognize this distinction to avoid such a result.

CONCLUSION

For all the foregoing reasons, *amicus* respectfully urges the Court to affirm the decision of the Court of Appeals for the Eighth Circuit to avoid serious negative consequences for all persons who engage in the voluntary cleanup and remediation of hazardous contamination.

Respectfully submitted,

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(6)

No. 06-562

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF READING COMPANY AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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I.

STATEMENT OF INTEREST

Reading Company ("Reading") submits this brief with the written consent of the parties and in support of the Petitioner. Sup. Ct. R. 37.3(a).[1]

Founded as a railroad in 1833, Reading grew to become "the largest corporation in the world" before filing for reorganization under Section 77 of the Bankruptcy Act of 1898 on November 23, 1971. *Pennsylvania Railroad Co. v. Reading Co.*, 132 F. Supp. 616, 617 (E.D. Pa. 1955), *aff'd*, 226 F.2d 958 (3d Cir. 1955); *In re Reading Co.*, 24 B.R. 858, 859 (E.D. Pa. 1980). Reading emerged from bankruptcy on January 1, 1981. *In the Matter of Reading Company*, 115 F.3d 1111, 1114-15 (3d Cir. 1997). Just three weeks before Reading's emergence, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, "became law, effective immediately." *In the Matter of Reading Co.*, 115 F.3d at 1115.

The near-coincidence of CERCLA's enactment and Reading's emergence from reorganization has given Reading a unique vantage point on the intersection of CERCLA and bankruptcy law. Reading litigated perhaps the principal appellate decision dealing with CERCLA claims privately asserted after a bankruptcy's conclusion and based on operations undertaken and completed before the bankruptcy ended. *See In the Matter of Reading Company*, 115 F.3d 1111. Moreover, even after its reorganization, Reading still

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[1] Pursuant to Rule 37.6, Reading affirms that no party or their counsel authored, or paid for, this brief in whole or in part.

faces the threat of CERCLA claims arising from rail operations started and finished before its bankruptcy ended. Accordingly, Reading's interest in the nature and scope of contribution and cost recovery rights provided to private parties under CERCLA is immediate and direct.

The issue before this Court involves what rights of recovery, if any, exist under CERCLA § 107 for a potentially responsible party ("PRP") who cannot use the express provision for contribution found in CERCLA § 113. Specifically, the facts before this Court involve a claim made by a PRP under CERCLA § 107(a)(4)(B). Those facts, however, do not involve a reorganized company like Reading. Reading therefore respectfully submits this amicus brief to offer this Court a perspective on how the CERCLA cost recovery issue before it impacts reorganized companies.

In that regard, Reading submits that, in considering whether a PRP who is unable to bring a contribution action under CERCLA § 113 may bring an action under CERCLA § 107(a)(4)(B), this Court should be cognizant of the competing goals of CERCLA and the Bankruptcy Code. Without recognition and accommodation of these competing goals, CERCLA § 107(a)(4)(B) actions asserted against reorganized companies or discharged individuals after a bankruptcy effectively could strip former debtors of the fresh start Congress intends bankruptcy proceedings to offer. Further, if the Court construes CERCLA § 107(a)(4)(B) to provide a right of action for those PRPs who cannot rely on § 113, Reading submits that this Court's construction should attempt to reconcile, or at least minimize, the potential for conflict with the Bankruptcy Code.

II.

ARGUMENT

A. No Right Of Action Under CERCLA § 107(a)(4)(B) Should Be Provided For PRPs Ineligible To Use CERCLA § 113 Because Providing Such A Right Of Action Under CERCLA Will Defeat The Purpose Of Bankruptcy Proceedings.

1. The Construction Of CERCLA § 107(a)(4)(B) Should Not Exacerbate An Inherent Tension Between CERCLA And The Bankruptcy Code.

An inherent tension exists between CERCLA and the Bankruptcy Code which this Court should acknowledge and minimize as it determines the availability of a right of recovery under CERCLA § 107(a)(4)(B) for PRPs ineligible to bring actions for contribution under CERCLA § 113. Lower courts have recognized "that the Bankruptcy Code and CERCLA point toward competing objectives" and that the two statutes "are in tension in significant respects." *In re Chateaugay Corp.*, 944 F.2d 997, 1002 (2d Cir. 1991); *In re National Gypsum*, 139 B.R. 397, 404 (N.D. Tex. 1992); *In the Matter of Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 974 F.2d 775, 779 (7th Cir. 1992). "The conflict begins at a basic level, since the goal of CERCLA – cleaning up toxic waste sites promptly and holding liable those responsible for the pollution – is at odds with the premise of bankruptcy, which is to allow debtors a fresh start by freeing them of liability." *In re Combustion Equipment Associates, Inc.*, 838 F.2d 35, 37 (2d Cir. 1988).

Thus, this Court has long recognized "that a central purpose of the [Bankruptcy] Code is to provide a procedure"

by which "'honest but unfortunate'" debtors can "reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.'" *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (quoting, in part, *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)). This purpose is recognized and applied in corporate reorganizations involving CERCLA liabilities. *Chateaugay*, 944 F.2d at 1002 ("The Code aims to provide reorganized debtors with a fresh start, an objective made more feasible by maximizing the scope of a discharge."); *National Gypsum*, 139 B.R. at 407; *United States v. Union Scrap Iron & Metal*, 123 B.R. 831, 835 (D. Minn. 1990).

Yet, while bankruptcy proposes to limit and discharge liability, CERCLA § 107(a) serves the opposite purpose – it aims to identify and impose liability on four broad categories of persons. As the United States notes in its petition for certiorari:

> Section 107(a) of CERCLA imposes liability for cleanup costs on four categories of "[c]overed persons – typically known as potentially responsible parties (PRPs) – associated with the release or threatened release of hazardous substances. ... PRPs are defined as (1) owners and operators of facilities at which hazardous substances are located; (2) past owners and operators of such facilities at the time that disposal of hazardous substances occurred; (3) persons who arranged for disposal or treatment of hazardous substances; and (4) certain transporters of hazardous substances.

2006 WL 3024300, at *3 (citations omitted); *see also* 42 U.S.C. § 9607(a)(1)-(4).

PRPs can be liable for cleanup costs to the government, to other PRPs, and to private persons who are not PRPs. *See* 42 U.S.C. §§ 9607(a)(4)(A), 9607(a)(4)(B), 9613(f)(1). It is the manner and timing of the recovery of these costs that creates the tension with the goals of bankruptcy proceedings. This Court's construction of CERCLA § 107(a)(4)(B) should be made with due regard for this tension and should limit it to the greatest extent possible. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-134 (1974)), and quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also In re Jensen*, 995 F.2d 925, 928 (9th Cir. 1993) (noting conflict between CERCLA and the Bankruptcy Code and citing *Midlantic Nat'l Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494 (1986), and *Ohio v. Kovacs*, 469 U.S. 274 (1985), to observe that, despite these tensions, "the Supreme Court has indicated more than once that, if possible, these two conflicting objectives should be reconciled.").

2. Providing A PRP Who Is Ineligible To Bring A Contribution Action Under CERCLA § 113 With An Independent Right Of Recovery Under CERCLA § 107(a)(4)(B) Would Exacerbate Tension Between CERCLA And The Bankruptcy Code And Materially Disrupt Bankruptcy Proceedings.

Under CERCLA § 107, the "'cost recovery' section of CERCLA," the government may recover its response costs from PRPs whenever the government either has cleaned up a contaminated area or compelled PRPs "to perform the cleanup" under CERCLA. *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 161 (2004) (citing *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994)). "In general, a section 107 cost recovery action ... imposes joint

and several liability on" PRPs. *New Castle County v. Halliburton NUS*, 111 F.3d 1116, 1121 (3d Cir. 1997).

Certain private parties also may use CERCLA § 107 to recover the costs of cleanup. Specifically, "Section 107(a) provides that responsible parties are liable for 'any ... necessary costs of response incurred *by any other person* consistent with the national contingency plan.'" *Key Tronic*, 511 U.S. at 813 (citing CERCLA § 107(a)(4)(B)) (emphasis added). This Court has divided over the question of whether the private cause of action under CERCLA § 107(a)(4)(B) is expressly or impliedly granted. But the Court agrees that private parties have a right of action under CERCLA § 107. *Key Tronic*, 511 U.S. at 818 n.11 and 822 n.1 (Scalia, J., dissenting).

With respect to the right of action available under CERCLA § 107, however, this Court has left open the question of whether and under what circumstances private parties can use § 107(a)(4)(B) to recover the costs of cleanup. *Cooper Industries*, 543 U.S. at 169 (citing cases). That is the issue presented in the United States' certiorari petition.[2]

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2 In its petition for certiorari, the United States offers a plain reading of CERCLA § 107(a)(4)(B) to argue that the section does not authorize private PRPs to sue. It observes that "the most natural reading of the phrase 'any other person' [in § 107(a)(4)(B)] is that it excludes the persons who are the subject of the sentence, i.e. PRPs." 2006 WL 3024300, at *15. Those lower courts which have limited CERCLA § 107 to private parties who are not PRPs have likewise reasoned that it "'is sensible to assume that Congress intended only innocent parties – not parties who were themselves liable – to be permitted to recoup the whole of their expenditures.'" *New Castle County*, 111 F.3d at 1121 (citing and quoting *United Technologies, Inc. v. Browning-Ferris Indus., Inc.*, 33

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CERCLA § 107(a)(4)(B) is not, of course, the only way in which a private party might try to recover cleanup costs. In 1986, upon the enactment of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. 99-499, 100 Stat. 1613, CERCLA gained "an express cause of action for contribution, codified as CERCLA § 113(f)(1)...." *Cooper*, 543 U.S. at 162-63. Under CERCLA § 113:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title.

42 U.S.C. § 9613(f)(1).[3]

Two prerequisites must exist before a CERCLA § 113 claim for contribution can be asserted. First, the government must have acted under CERCLA § 106 or § 107(a) to sue the person who would bring a § 113 contribution claim. *Cooper*, 543 U.S. at 160-61. Second, there must be common liability between two parties liable to a third person. *Reading*, 115 F.3d at 1120-21, 1124 (citing cases) ("CERCLA contribution, like common law contribution, requires some

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F.3d 96, 100 (1st Cir. 1994)). Reading agrees with this position for the reasons advanced in this brief.

3 Before SARA was enacted, courts had allowed PRPs to obtain contribution from other PRPs by implying a right to contribution from either the text of the statute or federal common law. *Cooper*, 543 U.S. at 162 (citing cases); *see Reading*, 115 F.3d at 1118-19. Once again, however, this Court has not expressly decided "whether any judicially implied right of contribution survived the passage of SARA." *Cooper*, 543 U.S. at 171.

form of joint liability."); *United Technologies, Inc. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 103 (1st Cir. 1994) (the term "contribution" under § 113 "should be given its plain meaning."). Each party in a CERCLA § 113 action must be "liable or potentially liable" under CERCLA § 107 to a third party. 42 U.S.C. § 9613(f)(1).

In contrast to a claim under CERCLA § 113, only four prerequisites are necessary for a cost recovery claim under CERCLA § 107: (1) a facility from which there is (2) a release or threat of release of a hazardous substance into the environment (3) that causes either the government or a private party to incur costs of response, commonly called cleanup costs, which are recoverable (4) from one of the four categories of PRPs described in CERCLA § 107(a)(1)-(4). *Reading*, 115 F.3d at 1118; *see also* 42 U.S.C. § 9607(a).

Given these requirements, providing a private PRP with an independent cause of action under CERCLA § 107(a)(4)(B) opens the door to disruption of bankruptcy proceedings in two critical ways.

First, if a CERCLA § 107 action is extended independently to private PRPs, a settlement or discharge of CERCLA liability to the government effected by and during a bankruptcy would have diminished value to any debtor. As long as PRPs are restricted to CERCLA § 113(f)(1) claims for contribution, the viability of such CERCLA claims against a reorganized company or discharged individual depends on what the government does, or fails to do, to assert or preserve its own CERCLA § 107(a)(4)(A) claims during a bankruptcy. *Reading*, 115 F.3d at 1119-21, 1126 (post-bankruptcy contribution claim under CERCLA § 113 fails "as a matter of law" because the bankruptcy precludes the possibility of common liability to a third party once CERCLA liability to the government was discharged). Once the restriction to CERCLA § 113 is removed and CERCLA

§ 107(a)(4)(B) becomes available to a PRP, however, the settlement or discharge of CERCLA liability to the government during a bankruptcy will not protect a reorganized company because common liability *is not* expressly required for recovery under § 107.

Second, if CERCLA § 107(a)(4)(B) is extended independently to private PRPs, reorganized companies and discharged individuals who emerge from bankruptcy will be unable, despite their best efforts, to ascertain the effect of their discharge on CERCLA liability related to operations started and finished before the bankruptcy ended. A former debtor could no longer know that, by having discharged or settled CERCLA liability to the government during bankruptcy, it had gained protection against the post-bankruptcy assertion of CERCLA liability by PRPs for any operations started and finished before the bankruptcy ended.

Indeed, in such an environment, bankruptcies would become even more complex and costly than they are already. Because CERCLA § 107(a)(4)(B) allows the recovery of costs private parties have voluntarily incurred, some of the sites affected by a bankruptcy might not involve the government in any way. Other sites could be ones where EPA has ordered or performed a cleanup. In either event, though, CERCLA sites can involve dozens or even hundreds of PRPs. For example, the site at the center of *Reading* involved more than 600 PRPs, only 36 of which the United States ordered and later sued. *Reading*, 115 F.3d at 1116; *see also Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 762 (7th Cir. 1994) (involving a site where "more than 200 firms generated hazardous wastes" and EPA unilaterally ordered approximately 21 PRPs to conduct emergency cleanup). Faced with what could be hundreds of post-bankruptcy claims by PRPs, the former debtor would need to be able to demonstrate that each and every such CERCLA § 107(a)(4)(B) claim somehow was discharged or settled

during its bankruptcy. As a practical matter, that burden is not sustainable, and it is highly unlikely that all such claims could be recognized and discharged in a bankruptcy. And, faced with these uncertainties, the cost of reorganizing will increase, since lenders will need greater assurance that there are no contingent environmental liabilities which escaped the effects of discharge.

Moreover, as a legal matter, at any given site, some – possibly even all – of the CERCLA § 107(a)(4)(B) claims asserted after bankruptcy will fall outside of the Bankruptcy Code's definition of "claim" at the moment a bankruptcy discharge is granted. In corporate reorganizations under Chapter 11 of the Code, "the confirmation of a plan" of reorganization "discharges the debtor from any debt *that arose before the date of such confirmation....*" 11 U.S.C. § 1141(d)(1)(A) (emphasis added). Similarly, in individual bankruptcies under Chapter 7, with certain limited exceptions that do not expressly include CERCLA liability, an individual may be discharged "from all debts *that arose before the date of the order of relief....*" 11 U.S.C. § 727(b) (emphasis added).

"Because bankruptcy discharges liability only for claims that arose before the bankruptcy petition was filed, the focus of the Court's inquiry must be on when the CERCLA obligations arose." *In re Chateaugay Corp.*, 112 B.R. 513, 520 (S.D.N.Y. 1990), *aff'd*, 944 F.2d 997 (2d Cir. 1991). The timing of when "liability on a claim" – i.e., a "debt" under the Code – arises is therefore critically important to determine if a claim can be discharged in bankruptcy. *See* 11 U.S.C. §§ 101(5) and (12) ("claim" and "debt" defined). In considering the tension between CERCLA and bankruptcy, there is:

> a question at the heart of this tension: at what point does a party have a CERCLA claim for

> the purposes of bankruptcy so that the failure to raise the claim before bankruptcy bar dates forever bars the claim from being recognized against the successors to a reorganized company?

Chicago, Milwaukee, 974 F.2d at 779. .

And the tension is not easily resolved – if it can be resolved at all – because "there may exist considerable delay between environmental harm and the discovery of such harm," and because of divergent case law on when a party has a CERCLA claim recognizable in bankruptcy. *National Gypsum*, 139 B.R. at 408 n.27.

3. To Preserve The Paramount Purposes Of Bankruptcy Proceedings, Private Parties Who Are Ineligible To Bring A Contribution Action Under CERCLA § 113 Should Not Be Provided With An Independent Right Of Recovery Under CERCLA § 107(a)(4)(B).

In effect, three tests have emerged to determine when CERCLA claims arise for the purposes of bankruptcy.[4] Under the first test, "a claim exists only when the pre-bankruptcy relationship between the debtor and third party contained all the elements necessary to give rise to a legal obligation under" CERCLA. *Union Scrap*, 123 B.R. at 835. "Because EPA had incurred no response costs at the time of

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4 *See* Ingrid Michelsen Hillinger & Michael G. Hillinger, *Environmental Affairs in Bankruptcy: 2004*, 12 Am. Bankr. Inst. L. Rev. 331, 379-89 (Winter, 2004); *see also* Philippe J. Kahn, *Bankruptcy Versus Environmental Protection: Discharging Future CERCLA Liability in Chapter 11*, 14 Cardozo L. Rev. 1999, 2023-32 (1993).

... confirmation," the *Union Scrap* Court found that "the EPA could have no claim in the bankruptcy proceedings," since "there was no legal obligation under CERCLA." *Id.* at 836.

Under the second, at the opposite extreme, the existence of a claim depends on when the release or threat of release which gave rise to the CERCLA liability asserted post-bankruptcy first occurred. *In re Jensen*, 127 B.R. 27, 33 (B.A.P. 9th Cir. 1991); *Chateaugay*, 944 F.2d at 1005. And for the third, arguably a middle ground, courts have found CERCLA claims dischargeable in a bankruptcy "when a potential CERCLA claimant can tie the bankruptcy debtor to a known release of a hazardous substance which the potential claimant knows will lead to CERCLA response costs...." *Chicago, Milwaukee*, 974 F.2d at 786; *see also National Gypsum*, 139 B.R. at 407-08 (a CERCLA claim arises when "fair contemplation of future costs based on pre-petition conduct can occur at any particular site by the parties.").

The analytical framework of these three tests reveals more clearly the threat to bankruptcy proceedings of making a CERCLA § 107(a)(4)(B) independently available to PRPs ineligible to use CERCLA § 113.

PRPs come into existence continuously, as substances hazardous under CERCLA are generated, transported to, and released at a contaminated site. Years before emerging from reorganization, a reorganized company may completely cease to generate waste found at a contaminated site, or to transport waste to a site, but that site may remain open and accept waste for years after the reorganization ends. *Reading*, 115 F.3d at 1115-16, n.2 (noting that operations at the site began in 1941 but did not stop until 1985, more than four years after Reading emerged from bankruptcy on January 1, 1981); *In the Matter of Reading Co.*, 900 F. Supp. 738, 741-42 (E.D. Pa. 1995) (noting chronology of waste

shipments and bankruptcy), *aff'd*, 115 F.3d 1111 (3d Cir. 1997). Given these possibilities, there is little doubt that a person who was not a PRP during a bankruptcy can become one after the bankruptcy ends.

Although the express inclusion of contingent claims within the Bankruptcy Code's definition of "claim" at 11 U.S.C. § 101(5) initially might appear to preclude any question of post-bankruptcy exposure to liability under CERCLA § 107(a)(4)(B) for operations ended before a bankruptcy ends, the answer is not so simple. A CERCLA § 107(a)(4)(B) claim asserted by a PRP post-bankruptcy can be classified as a discharged contingent claim *only if* a relationship existed between the private CERCLA claimant and the debtor *during the bankruptcy*.[5]

Thus, it was the preexisting relationship between debtor and claimant during bankruptcy which led the Second Circuit in *Chateaugay* to classify CERCLA claims held by EPA as "'contingent,' rather than as ... outside the Code's

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5 A contingent claim concerning a future injury is not found to exist under bankruptcy law unless and until the private claimant who would suffer discharge of the claim is first found to have some sort of relationship to or knowledge of the debtor while the debtor was in bankruptcy. *See Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 943 (3d Cir. 1985) (tort claim in § 77 railroad reorganization); *Chicago, Milwaukee*, 974 F.2d at 782 (CERCLA claim in § 77 railroad reorganization); *Chateaugay*, 112 B.R. 513, 520 (S.D.N.Y. 1990), *aff'd*, 944 F.2d 997, 1003-06 (CERCLA claims in Ch. 11 reorganization); and *In re Penn Central Transp. Co.*, 944 F.2d 164, 167-68 (3d Cir. 1991) (refusing to find CERCLA liability, asserted after a completed § 77 reorganization, was discharged in 1979 during reorganization as a contingent claim because relationship necessary to sustain a contingent claim did not come into existence until CERCLA's enactment in 1980); *see also* 2-101 A.N. Resnick & H. J. Sommer, *Collier on Bankruptcy* ¶ 101.5[1] (15th ed. rev. 2006).

definition of 'claim,'" even though EPA did "not yet know the full extent of the hazardous waste removal costs it may one day incur and seek to impose upon" the debtor, and might "not yet even know the location of all the sites at which such wastes may yet be found." *Chateaugay*, 944 F.2d at 1005. "The relationship between the environmental regulating agencies and those subject to regulation provides sufficient 'contemplation' of contingencies to bring most ultimately maturing payment obligations based on pre-petition conduct within the definition of 'claims.'" *Id.* The claimant and the debtor knew each other: EPA was "acutely aware" of the debtor "and vice versa." *Id.*

Between PRPs in a CERCLA § 107(a)(4)(B) action, however, there will be *no relationship* remotely similar to that which exists between the government and a regulated debtor-PRP. A PRP who generates hazardous waste and has it sent to a landfill which later becomes subject to CERCLA and another PRP who generates hazardous waste and uses the same landfill may each know the owner or operator of the landfill. But these generator-PRPs have no reason to know or learn of the identity of the other until the government enforces CERCLA. As a result, the claims of such generator-PRPs against each other could not be treated as contingent claims that arose to be discharged in a bankruptcy.

For that reason, neither of the legal tests articulated in *Chateaugay* and *Chicago, Milwaukee* would offer a way to view such CERCLA § 107(a)(4)(B) claims as discharged contingent claims under the Bankruptcy Code. The only test that might arguably apply is the one used in *Union Scrap*, since it was developed and applied for a site where EPA did not know of the debtor's link to the contaminated site in question. However, the reasoning in *Union Scrap* does not foreclose post-bankruptcy assertions of CERCLA liability by private PRPs precisely because, in cases where the claimant

has no reason to link the debtor to a contaminated site, *Union Scrap* places the claim entirely outside the furthest reach of a bankruptcy discharge.

Under the holding of *Union Scrap*, the CERCLA § 107 claim of a private PRP would not exist *until* that PRP first incurred a cost it later tried to recover under § 107. If the PRP asserting CERCLA § 107(a)(4)(B) liability had only first incurred costs *after* confirmation of a plan of reorganization or discharge of an individual, that claimant "could have no claim in the bankruptcy proceedings" that would have been discharged. *Union Scrap*, 123 B.R. at 836. This outcome could occur even if the private claimant, as EPA did in *Union Scrap*, knew of the bankruptcy. *Id.* at 834.

Providing a right of recovery under CERCLA § 107(a)(4)(B) to such PRPs will effectively hand over the power to the PRP to circumvent a bankruptcy discharge merely by refusing to spend money. As an agency charged with protecting human health and the environment, EPA perhaps can be trusted, as it was in *Union Scrap*, with the discretion to decide when to incur response costs. As polluters, PRPs should not be routinely granted this same sort of ability to decide when a CERCLA claim that might otherwise be dischargeable in bankruptcy comes into existence.

Accordingly, none of the three tests used to determine when a CERCLA claim dischargeable in bankruptcy arises can prevent the CERCLA § 107(a)(4)(B) claims of PRPs from circumventing entirely the effects of a bankruptcy discharge. Allowing PRPs to bring such claims effectively will create a judicial exception to discharge. This Court has previously refused to create a judicial exception to discharge in bankruptcy when a state sought to exempt environmental obligations under an injunction obtained before bankruptcy from the scope of a bankruptcy discharge. *Kovacs*, 469 U.S.

at 278 ("Except for the nine kinds of debts saved from discharge by 11 U.S.C. § 523(a), a discharge in bankruptcy discharges the debtor from all debts that arose before bankruptcy."). The Court's construction of CERCLA § 107(a)(4)(B) should not create a judicial exception to discharge for private PRPs, particularly when the resulting restriction on powers otherwise exercisable by a Bankruptcy Court would not be part of "a judicially developed doctrine intended to protect legitimate state or federal interests." *Midlantic Nat'l Bank*, 474 U.S. at 500-01, 507 (given "well-recognized restrictions on a trustee's abandonment power," a trustee may not abandon property in contravention of a state statute or regulation reasonably designed to protect the public heath or safety).

Until now, courts have been able to avoid the harm to bankruptcy discharges posed by PRPs using CERCLA § 107(a)(4)(B) for three principal reasons. First, after CERCLA's enactment, "the courts did not for several years interpret § 107(a) as containing" a private right of action even though they conceivably could have interpreted "§ 107(a)(4)(B)'s private right of action as emerging fully formed with the passage of CERCLA...." *Reading*, 115 F.3d at 1123. Second, after SARA's enactment, most courts barred PRPs from using CERCLA § 107 exclusively to assert liability, *see Cooper*, 543 U.S. at 169 (citing cases), or at the very least limited the availability of CERCLA § 107 to innocent landowners who had not polluted their property.[6]

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6 Private CERCLA § 107 claims brought by such landowners do not pose any threat to the working of the bankruptcy system. Under the tests of *National Gypsum* and *Chicago, Milwaukee*, a basis for knowledge such landowners may have can be identified and evaluated because landowners would be within a chain of title, near, or adjacent to a contaminated site. No similar basis exists for generators, transporters, or arrangers for disposal, of hazardous substances – the vast majority of PRPs.

New Castle County, 111 F.3d at 1123; *AM Int'l, Inc. v. Datacard Corp.*, 106 F.3d 1342, 1347 (7th Cir. 1997). Third, when it recognized a private right of action to exist under CERCLA § 107(a)(4)(B) in *Key Tronic*, this Court did not decide whether the CERCLA § 107(a)(4)(B) action was one for contribution or cost recovery. *Cooper*, 543 U.S. at 170; *see also Key Tronic*, 511 U.S. at 816-17.

Now, however, the case before the Court squarely presents the issue of the availability of CERCLA § 107 to PRPs. And, as the foregoing analysis demonstrates, the construction this Court gives to CERCLA § 107(a)(4)(B) could have far-reaching impacts on the ability of a reorganized company or a discharged individual to obtain a fresh start from a bankruptcy proceeding.

For several fundamental reasons, therefore, Reading urges this Court to hold that CERCLA § 107(a)(4)(B) is not available to private PRPs. First, as noted above, recognizing such a private right will diminish the value of any settlement of CERCLA liability reached with the government and will greatly complicate and prolong bankruptcies. Second, as a practical and legal matter, all such claims could not be recognized and discharged in a bankruptcy. Consequently, the recognition of such a right will prevent a bankruptcy proceeding from discharging contingent CERCLA liabilities and leave the reorganized company or debtor open to an endless series of after-bankruptcy claims. That result is irreconcilable with the most profound purpose of bankruptcy proceedings and should be foreclosed by this Court's construction of CERCLA § 107(a)(4)(B).

B. If A Right of Action Under CERCLA § 107(a)(4)(B) Is Provided For PRPs Ineligible To Use CERCLA § 113, Then That Right Of Action Should Be Characterized As An Implied Right Of Contribution To Accommodate The Purposes Of Bankruptcy Proceedings.

If this Court nevertheless construes CERCLA § 107(a)(4)(B) to be available to PRPs ineligible to use CERCLA § 113, then, to accommodate the purposes of bankruptcy, this Court should construe the right of recovery PRPs would exercise under § 107 as an implied right of contribution. Such a construction would preserve the concept of common liability which, in turn, could serve, as in *Reading*, to prevent private CERCLA claims from circumventing the effects of bankruptcy. Moreover, a basis for such a construction can be found in pre-SARA cases interpreting CERCLA § 107, and exists despite the lack of a need for prior governmental action in a CERCLA § 107 suit.

As it noted in *Cooper*, "this Court has visited the subject of implied rights of contribution before," albeit in cases not involving CERCLA, and it views as "debatable" the conclusion, reached by courts before SARA's enactment, that a right to contribution "arose either impliedly from provisions of the statute, or as a matter of federal common law." *Cooper*, 543 U.S. at 162 & 171. The skepticism the Court expressed about pre-SARA cases, however, did not concern pre-SARA cases addressing "whether a private party that had incurred response costs, but that had done so voluntarily and was not itself subject to suit, had a cause of action for cost recovery against other PRPs." *Cooper*, 543 U.S. at 161. Rather, the Court's skepticism centered around cases dealing with "the separate question whether a private entity that had been sued in a cost recovery action (by the Government or by another PRP) could obtain contribution from other PRPs." *Id.*

Review of the three pre-SARA cases this Court cited in which private parties used CERCLA § 107(a)(4)(B) "for cost recovery" shows how common liability to a third person can play a role in characterizing the right of recovery as a contribution action when a PRP brings it. *Cooper*, 543 U.S. at 161-62.

In the earliest pre-SARA case cited, *Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982), there had been "no expenditure of superfund monies nor [had] the federal or state government commenced an action against ... anyone" seeking a cleanup. *Id.* at 1142. Even though it did not call the CERCLA § 107(a)(4)(B) action it allowed Philadelphia to bring a contribution action, the *Stepan Chemical* Court nevertheless described § 107(a)(4)(B) as giving "a private party the right to recover its response costs *from responsible third parties* which it may choose to pursue...." *Id.* at 1143 (emphasis added). The PRP thus could use CERCLA § 107 to recover its costs even though it was "admittedly the owner of the ... site, and might have been liable to the federal or state governments had those entities commenced the cleanup...." *Id.* at 1143.

While *Stepan Chemical* allowed a PRP to use CERCLA § 107(a)(4)(B) to recover costs when the PRP was potentially liable to the government, the second case, *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887 (9th Cir. 1986), allowed a PRP to use CERCLA §107(a)(4)(B) to recover costs it had incurred even though California had not asserted liability for costs the government had incurred. Since the California Health Department had incurred costs to study the contaminated site, there was no doubt that the PRP in *Wickland Oil Terminals* actually was liable to the state. *Id.* at 889. The Ninth Circuit accordingly held that the PRP, which had acted voluntarily to address the conditions brought to its attention by the state, could use § 107(a)(4)(B) to recover its costs. *Id.* at 892.

In the third case, *Walls v. Waste Resource Corp.*, 761 F.2d 311 (6th Cir. 1985), the Sixth Circuit considered a case brought by "a group of residents and homeowners" against "the owner, operators and users" of "a waste dumping ground" near their town. *Id.* at 313-14. The Sixth Circuit allowed the homeowners' group "to recover costs from responsible parties under" CERCLA § 107(a)(4)(B) but did not characterize the plaintiffs before it as PRPs. *Id.* at 318. The reason was plain enough. The homeowners in *Walls*, as innocent persons acting in response to the threat of pollution they did not cause, are the "other" persons referred to in CERCLA § 107(a)(4)(B) who are not PRPs, have incurred costs, and seek to recover them. Under what in this case the government has referred to as "[t]he most natural reading of the phrase 'any other person'" in CERCLA § 107(a)(4)(B), the homeowners in *Walls* are the very persons entitled to sue PRPs. *See* 2006 WL 3024300, at *15.

In contrast to *Walls*, the PRPs in *Stepan Chemical* and *Wickland Oil Terminals*, as persons potentially or actually liable to the government under CERCLA § 107(a), stand in an entirely different position with respect to the right of recovery under CERCLA § 107(a)(4)(B). If it allows use of CERCLA § 107 by PRPs ineligible to use CERCLA § 113, their common liability to the government, whether it is actual or potential, should lead this Court to characterize their use of CERCLA § 107(a)(4)(B) as an action for contribution. The effort to apportion CERCLA liabilities between parties who are conceivably liable to the government – in short, between PRPs – involves common liability to a third party and is analogous to common-law contribution. The only difference is the element of compulsion, since a PRP invoking CERCLA § 107(a)(4)(B) in these circumstances would not have been sued by the

government.[7] However, given this contribution construction, a reorganized company sued after bankruptcy by a PRP under CERCLA § 107(a)(4)(B) could block the PRP's claim as a matter of law, just as the CERCLA § 113 claims were blocked in *Reading*, by demonstrating that its discharge in bankruptcy settled its CERCLA liability to the government for the site in question. This construction, in turn, would reconcile, to the greatest extent possible, the purposes of CERCLA and those of bankruptcy.

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[7] This Court has cited post-SARA decisions from the First, Second, Third, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuit Courts of Appeal which barred PRPs from pursuing a § 107 action against other PRPs for joint and several liability. *Cooper*, 543 U.S. at 169 (citing cases). In doing so, the Court stated that, in order to decide if a PRP ineligible to use CERCLA § 113 could use CERCLA § 107, it would need "to consider whether these decisions are correct...." *Id.* All but one of the cited cases involved a cleanup coerced by suit, unilaterally ordered, or performed under a consent order. Significantly, however, in the one cited case in which the PRPs cleaned up voluntarily, without any governmental order or suit, the Ninth Circuit categorized the PRPs' claims as contribution claims and noted that "while § 107 created the right of contribution, the 'machinery' of § 113 governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 107." *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1300-02 (9th Cir. 1997).

C. If A CERCLA § 107(a)(4)(B) Right Of Action By PRPs Ineligible To Use CERCLA § 113 Is Characterized As One For Cost Recovery, Reorganized Companies And Discharged Individuals Who Have Settled Or Discharged CERCLA Liability To The Government In Bankruptcy Should Not Be Subject To Suit In Such Actions.

Reading agrees, as the United States has argued in its petition for certiorari, that allowing PRPs to use CERCLA § 107 to recover costs when they could not use CERCLA § 113 would render § 113 "effectively superfluous" and allow circumvention of the settlement bar codified at CERCLA § 113(f)(2). 2006 WL 3024300 *18. If this Court should conclude, however, that use by such PRPs of CERCLA § 107 would not render CERCLA § 113 superfluous or circumvent the settlement bar found at CERCLA § 113(f)(2), the rationale underlying such a conclusion concomitantly should protect any settlement or discharge which has occurred in or as a result of a bankruptcy. Just as any construction of CERCLA § 107 made in this case should assure the continuing integrity of CERCLA § 113, so should it also insure the continuing vitality of a discharge granted to a debtor which settles or discharges CERCLA liability to the government during a bankruptcy. To achieve the purpose and protect the integrity of a bankruptcy proceeding, whether the debtor has settled CERCLA liability to the government, or the bankruptcy has discharged that liability without a settlement, the resolution of the debtor's CERCLA liability should preclude the assertion by a PRP, after a reorganization or liquidation has ended, of a CERCLA § 107(a)(4)(B) action against the former debtor for operations which ended with or before bankruptcy.

III.

CONCLUSION

As the foregoing analysis provides, this Court's ultimate construction of CERCLA § 107(a)(4)(B) should consider its implications for reorganizations and liquidations, including, most significantly, the impact on the fresh start intended for the debtor who emerges from bankruptcy. This Court's ultimate construction should limit, rather than heighten, any conflicts between CERCLA and bankruptcy law.

Respectfully submitted,

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NO. 06-562

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,

Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE OF THE STATES OF WASHINGTON, ALABAMA, ALASKA, ARKANSAS, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OREGON, RHODE ISLAND, TENNESSEE, TEXAS, UTAH, VERMONT, AND WISCONSIN, AND THE DISTRICT OF COLUMBIA, AND THE COMMONWEALTH OF PUERTO RICO IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675, imposes liability on a number of persons for costs of cleaning up property contaminated by hazardous substances. Can a person who is liable under Section 107(a) bring a cause of action against another liable person to recover "necessary costs of response" as provided for in Section 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B)?

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I. INTEREST OF AMICI CURIAE

The State of Washington, together with thirty-seven other Amici Curiae States, the District of Columbia, and the Commonwealth of Puerto Rico, respectfully urge affirmance of the Eighth Circuit Court of Appeals decision in *Atlantic Research Corporation v. United States*, 459 F.3d 827 (8th Cir. 2006), holding that Section 107(a)(4)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675[1], provides a right of cost recovery for parties liable under CERCLA who have voluntarily cleaned up contamination.

There are thousands of sites across the country contaminated by hazardous substances harmful to human health and the environment. The Environmental Protection Agency (EPA) estimates that there are approximately 450,000 commercial and industrial cleanup sites nationwide.[2] By way of example, 3,138 sites are listed on the State of Washington's Confirmed and Suspected Contaminated Sites List and 1,249 confirmed sites

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[1] To provide references consistent with those in the Brief For The United States, the Amici States' brief uses CERCLA citations rather than United States Code citations. Thus, 42 U.S.C. § 9601 is CERCLA § 101 or Section 101.

[2] Information regarding the number of contaminated sites in the United States is available via EPA's website. EPA, *The Facts Speak for Themselves: A Fundamentally Different Superfund Program* (Nov. 2006), *available at* http://www.epa.gov/superfund/whatissf/sf_fact4.pdf (visited Apr. 4, 2007).

have been prioritized by the State.[3] *See also infra* note 21 (discussing the number of sites reported by the Department of Defense).

Congress passed CERCLA in 1980 to address the legacy of this contamination. CERCLA gives the States important roles in addressing contaminated sites. States participate in the planning, selection, and implementation of remedial actions. CERCLA § 121(f); 40 C.F.R. §§ 300.500–300.525 (2005). For example, EPA may not take remedial action under CERCLA unless the State in which a release occurs enters into a contract or cooperative agreement with the federal government.[4] CERCLA § 104(c)(2)–(3). EPA may defer listing an eligible site on the National Priority List if a State is conducting cleanup or another party is conducting cleanup under a State's oversight. CERCLA § 105(h)(1). This congressional recognition of the role of States in the cleanup of contaminated sites supports strong consideration of the views of the Amici States. *See also* Brief For The United States (U.S. Br.) 4 n.3 (acknowledging the role of the States in providing review and oversight at many CERCLA sites).

The Amici States work on the front lines with regard to cleaning up contaminated property,

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[3] Information regarding Washington sites is available at http://www.ecy.wa.gov/programs/tcp/cscs/cscspage.htm. *See also Model Toxic Control Accounts Fiscal Year 2005 Annual Report* (Oct. 2006), *available at* http://www.ecy.wa.gov/biblio/0509095.html (visited Apr. 4, 2007).

[4] The President delegated most of his CERCLA authority to the EPA via Executive Order No. 12580, 52 Fed. Reg. 2923 (Jan. 23, 1987).

improving local communities, and protecting the public health. Amici States are therefore vitally interested in ensuring that CERCLA is properly construed to promote its goal of expeditious cleanup action with respect to as many contaminated sites as practicable, and to avoid unnecessary and inefficient use of limited state resources. These state interests would be compromised if, as the United States urges, CERCLA's cost recovery remedies are unavailable to potentially liable persons who take appropriate voluntary response actions to address contamination. The State of Washington, for example, oversees many cleanups using administrative orders and consent decrees. But the majority of hazardous waste sites in Washington are cleaned voluntarily by potentially liable parties using expert contractors applying state and federal cleanup standards.[5] If CERCLA is not construed to include the incentive of reasonable recovery of cleanup costs in the common scenario where a liable party voluntarily incurs costs of cleanup, then contaminated property will remain unused and unproductive, and will endanger human health and the environment for a longer time.

II. SUMMARY OF ARGUMENT

The United States' contention that Section 107(a)(4)(B) allows only "innocent" persons to

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[5] *See also, e.g.*, Senate Journal, 24th Leg., 2nd Sess., at 2189–90 (Alaska 2006), *available at* http://www.legis.state.ak.us/basis/get_jrn_page.asp?session=24&bill=HB269&jrn=2189&hse=S (visited Apr. 4, 2007) ("Voluntary cleanups form the vast majority of cleanups conducted in the state of Alaska."); Wisconsin Dep't of Natural Res., *Voluntary Party Liability Exemption available at* http://www.dnr.state.wi.us/org/aw/rr/liability/purchasers_0.html (visited Apr. 4, 2007).

recover response costs voluntarily incurred at a contaminated site is incompatible with CERCLA's plain language and statutory scheme. The United States argues that "any other person" refers to any person not listed in Section 107(a)(1) through (4). The United States' argument asks this Court to ignore the far more obvious meaning of the words "any other person" as referring to persons other than the governmental parties identified by the immediately preceding subsection.

Section 107(a)(4)(A) provides that the United States, a State, or an Indian tribe may recover their cleanup costs from persons liable under Section 107(a)(1) through (4). Section 107(a)(4)(B) then provides that "any other person" may similarly recover cleanup costs from persons liable under Section 107(a)(1) through (4). In context, "any other person" in Section 107(a)(4)(B) does not mean only "innocent" persons, as the federal government argues; rather, it means any persons other than those mentioned in the preceding Section 107(a)(4)(A). This construction of Section 107(a)(4)(B) is consistent with this Court's emphasis in other cases that the most sensible reading of referential words like "any other person" is that they refer to the last antecedent. Here, Section 107(a)(4)(B) refers to, and thus differentiates, response costs incurred by government persons from response costs incurred by non-government persons.

Moreover, liability under Section 107(a) is "subject only to the defenses" set forth in Section 107(b). Those defenses allow the United States or other persons to avoid liability by showing that another person was the "sole cause" of the release.

The United States' argument essentially creates a new defense to liability, where it avoids liability by proving that the plaintiff seeking cost recovery is partly liable for the site. The United States' argument that Section 107(a)(4)(B) does not apply because a contribution action under Section 113(f) is the exclusive means of cost recovery for liable parties, also ignores the introduction language of Section 107(a) providing that it applies "notwithstanding any other provision or rule or law." Finally, the United States' argument is also contrary to EPA's past interpretations, which never limited the right to seek response costs to "innocent" persons as now urged by the United States.

In addition to straining the statutory language, the United States' construction frustrates the purposes of CERCLA previously recognized by this Court—to promptly clean up contaminated sites and to ensure that all liable persons pay for the cleanup. A reading that only "innocent" persons may recover their response costs decreases the number of contaminated sites that will be addressed voluntarily. Construing Section 107(a)(4)(B) to provide a cost recovery claim for *all* persons who voluntarily address contamination, including persons who may be liable under Section 107(a)(1) through (4), promotes more expeditious cleanup and fulfills CERCLA's purpose to impose costs broadly.

The United States' interpretation of Section 107(a)(4)(B), if accepted, also would create a serious tension for the United States in its dual role as liable party and enforcement agency. According to the United States, a liable person's CERCLA remedy is limited to contribution under Section 113(f). But as

this Court ruled in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), Section 113(f) applies only when persons are subject to suits under Sections 106 and 107, or settle their liability with the state or federal government. As the court below recognized, because the United States has control over such civil suits and settlements, the United States could exercise its enforcement discretion to insulate liable federal agencies from CERCLA contribution claims. This result not only creates an odd tension, it conflicts with Section 120(a)(1) where Congress provided that the United States "shall be subject to, and comply with, [CERCLA] . . . to the same extent" as any private party.

Finally, the United States cannot support its argument that cost recovery by a liable party under Section 107(a) would come at the expense of government powers or priorities. Limiting cost recovery to Section 113(f), however, would affect the ability of Amici States to focus their limited resources on the most significant contaminated sites. A voluntary cleanup may be financially feasible only if the party who incurs costs knows that he or she can recover costs from other liable parties. If cost recovery is not available under Section 107(a)(4)(B), parties ready to conduct voluntary cleanups may refuse and press for state enforcement actions in order to have Section 113(f) contribution rights. As a result, Amici States will be pressured to shift limited legal and program staff resources to lower priority sites, or risk losing the benefit of prompt voluntary cleanups consistent with the national contingency plan.

III. ARGUMENT

A. Section 107(a)(4)(B) Provides A Right Of Cost Recovery For Liable Persons Who Voluntarily Incur Response Costs

Section 107(a)(4)(A) through (D) identify who may recover various cleanup related costs and damages from liable persons. Section 107(a)(4)(A) provides that persons identified in Section 107(a)(1) through (4) are liable for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan." The immediately following subsection, Section 107(a)(4)(B), authorizes recovery of "any other necessary costs of response incurred by any other person consistent with the national contingency plan."

The principal question in this case is whether the phrase "any other person" in Section 107(a)(4)(B) refers to persons other than those referenced in the immediately preceding subsection, i.e., "the United States Government or a State or an Indian tribe," as the Amici States submit; or whether "any other person" refers to a far narrower class of persons, i.e., only non-liable private parties, as the United States contends. The United States describes the narrow class of "other persons" who have a cause of action under Section 107(a)(4)(B) as "innocent" parties. U.S. Br. 16.

1. The United States' argument should be rejected based on fundamental principles of statutory construction beginning with the principle "that the starting point for interpreting a statute is the

language of the statute itself." *Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The language at issue, read naturally, means that taken together, Section 107(a)(4)(A) and (B) include all persons who have incurred necessary response costs.

Section 107(a) begins with subsections (1) through (4) describing four types of liable persons. Any and all of these four types of persons "shall be liable for":

> "(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> "(B) *any other necessary costs of response incurred by any other person* consistent with the national contingency plan;
>
> "(C) [certain damages to natural resources]; and
>
> "(D) [certain health assessments]." CERCLA § 107(a)(4) (emphasis added).[6]

The natural reading of the phrase "any other person" who "incurred" costs is that it refers to persons other than those mentioned in the immediately preceding subsection (A), i.e., the United States government or a State or an Indian

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[6] The codification suggests that clauses (A) through (D) are subsections of Section 107(a)(4). However, the text unambiguously shows that the liabilities in (A) through (D) apply to each of the persons described in Section 107(a)(1) through (4).

tribe. These governmental actors are each likely to incur response and remediation costs, but they are not the only parties who may incur such costs. Subsection (B) therefore addresses "any other person" who incurred response costs and similarly provides a "cause of action" against liable persons identified in Section 107(a)(1) through (4).

Part of considering plain language is this Court's recognition that "'[r]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.'" *Barnhardt v. Thomas*, 540 U.S. 20, 26 (2003) (quoting 2A N. Singer, *Sutherland on Statutory Construction* § 47.33, p. 369 (6th rev. ed. 2000)). As recognized in *Barnhardt*, this rule is not absolute. But here, no other indicia of meaning in Section 107 overcome this rule. Moreover, Section 107(a)(4)(B)'s reference to the immediately preceding subsection is confirmed by the parallel structure of the two subsections—one imposes liability for "costs" incurred by government persons and the next imposes liability for "any other" costs incurred by "any other persons."

2. It is difficult to imagine broader words than used in Section 107(a)(4)(B), which provides a cause of action for "*any other* necessary costs of response incurred by *any other* person." (Emphasis added.) This is a natural and expansive description of response costs not covered by Section 107(a)(4)(A).[7] It contradicts common sense for

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[7] A fair reading of "any" also supports the Amici States' reading that all CERCLA "persons" may seek recovery under Section 107(a)(4)(B). *See New York v. EPA*, 443 F.3d 880,

Congress to use such expansive words if, as the United States contends, Congress meant to limit who could seek response costs from other liable persons. Use of the expansive words "any other person" therefore refers to all "persons" within CERCLA's definition of person, other than those persons specifically identified in Section 107(a)(4)(A). *See* CERCLA § 101(21).

This natural reading of Section 107(a) led the Seventh Circuit to reach the same conclusion in *Metropolitan Water Reclamation District of Greater Chicago v. North American Galvanizing & Coatings, Inc.*, 473 F.3d 824 (7th Cir. 2007). The Seventh Circuit opinion thoroughly examines CERCLA and the Superfund Amendments and Reauthorization Act (SARA), relying on this Court's statement in *Key Tronic Corp. v. United States*, 511 U.S. 809, 818 (1994), that "§ 107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs." *Metro. Water*, 473 F.3d at 831 (quoting *Key Tronic*, 511 U.S. at 818). The opinions of the Seventh, Second[8], and Eighth Circuits each

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885–86 (D.C. Cir. 2006) (applying this Court's precedents for the propositions that each word in a statute must be given effect and "any," read naturally, has expansive meaning); *see also Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980) ("any other action" language in the Clean Air Act is broad and encompasses any final action by the EPA Administrator, similar to those enumerated in preceding provisions).

[8] *See Consol. Edison Co. of New York, Inc. v. UGI Utils., Inc.*, 423 F.3d 90, 99–100 (2d Cir. 2005) (finding no basis for reading into Section 107(a)(4)(B) a requirement that the person seeking cost recovery be an "innocent" party); *cf. E.I. DuPont De Nemours & Co. v. United States*, 460 F.3d 515 (3d Cir. 2006) (split panel decision applied but would not reconsider Third

provide sound reasons to reject the United States' argument that "any other person" under Section 107(a)(4)(B) bars a Section 107 cost recovery action by liable persons identified in Section 107(a)(1) through (4).[9]

3. The United States' reading of the words "any other person" in Section 107(a)(4)(B) is also at odds with the language of Section 107, which strictly limits the defenses available in a cost recovery action. Under Section 107(a), a person is liable "subject only to the defenses set forth in subsection (b) of this section." Section 107(b) provides a defense to "a person otherwise liable" if the person proves it was not negligent and the *sole cause* of the release of contamination was the act of an independent third party, an act of God, an act of war, or a combination of such causes.

Despite this language strictly limiting the defenses available to a "person otherwise liable" the United States, as an otherwise liable party under Section 107(a)(1) through (4), contends that Section 107(a)(4)(B) frees it from liability whenever a third party—the plaintiff in a cost recovery action—has any liability for the contamination under Section 107(a)(1) through (4). It makes little sense for

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Circuit precedent and held that a liable party could not use Section 107(a)(4)(B) for cost recovery).

[9] While *Cooper Industries* noted that the Court's discussion of cost recovery in *Key Tronic* was not a holding, the Court nonetheless "undertook a comprehensive discussion of the rights of action available under CERCLA." *Metro. Water*, 473 F.3d at 832. Indeed, the party seeking recovery (Key Tronic) was itself a liable person under Section 107(a).

Congress to tightly limit defenses to liability by imposing a demanding burden of proof in Section 107(b), but then allow an otherwise liable party to escape liability for cost recovery under Section 107(a)(4)(B) by making the far easier showing that the plaintiff has some joint liability at the site.

The Court should not insert an additional defense into CERCLA based on the United States' strained reading of Section 107(a)(4)(B). Given the clear language of Section 107(a) that the only defenses to liability are found in Section 107(b), the Court should reject the United States' theory that only "innocent" parties can recover costs of response under Section 107(a).

4. The United States' argument that Section 113(f) is the exclusive means for liable persons to seek cleanup costs from other liable persons also is inconsistent with the language of Section 107(a). In construing Section 113(f), the Court emphasized that it should be read in context, considering surrounding sections. *See Cooper Indus.*, 543 U.S. at 166–67. By its terms, Section 107(a), applies "notwithstanding any other provision or rule of law," which would include Section 113(f). Section 107(a) provides for "an action under this section." Under the same rule applied in *Cooper Industries*, Section 113(f) should not be read to foreclose a right of recovery under Section 107(a)(4)(B), as the United States contends. Rather, Section 113(f) provides for a distinct remedy of contribution among liable parties. *See Cooper Indus.*, 543 U.S. at 162–63; *see also Cooper Indus.*, 543 U.S. at 167–68 (savings language in Section 113(f) "rebuts any presumption that the express right of contribution provided . . . is

the exclusive cause of action for contribution available to a PRP").

The United States' argument that Section 113 is an exclusive remedy is further undercut by its failure to explain why Congress would decide to make "innocence" (in the United States' vernacular) a necessary qualification to bring a cost recovery action under Section 107(a)(4)(B), but then turn around under Section 113 and provide a contribution right for parties who, by definition, are not "innocent." A more logical conclusion is found in Section 113(f)'s express reference to particular actions under Section 106 and Section 107(a), which confirms that contribution is a distinct, supplemental remedy.

The United States argues that Section 113(f) is a specific statutory remedy that preempts a "general" remedy of Section 107(a). U.S. Br. 27. Section 113(f), however, provides a distinct and additional remedy that is expressly tied to Section 107(a). In contrast, the cases cited by the United States are inapposite, rejecting the use of general remedies such as § 1983[10] when Congress provides a separate statutory scheme to address a specific problem.[11] Atlantic Research did not use a general

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[10] 42 U.S.C. § 1983.

[11] *See Prieser v. Rodriguez*, 411 U.S. 475, 488–89 (1973) (attack on detention under a judicial order must proceed under habeas corpus; 42 U.S.C. § 1983 not applicable to deprivation of good time credits); *Block v. North Dakota*, 461 U.S. 273, 285 (1983) (the Quiet Title Act of 1972, 28 U.S.C. § 2409a, provides exclusive remedy for quiet title and precludes mandamus suits against federal officers); *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 835 (1976) (Civil Rights Act of 1964, as amended, provides

remedy like § 1983 to bypass CERCLA and the principle argued by the United States is not applicable to Section 107(a)(4)(B).

Finally, there is a straightforward answer to the United States' argument that Section 107(a)(4)(B) would create cost recovery rights free from a statute of limitations applicable to contribution claims. U.S. Br. 30–31. Section 113(g)(2) provides a statute of limitations for "[a]ctions for recovery of costs." Admittedly, that section is complex, but it unambiguously applies to Section 107(a) claims.[12]

5. The United States' argument would lead to another incongruous result, a result inconsistent with Section 120(a)(1). When CERCLA was amended and reauthorized by SARA, Congress

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exclusive judicial remedy for discrimination claims in federal employment, precluding jurisdiction under declaratory judgment acts or other federal law); *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) (judicial remedy expressly authorized by Telecommunications Act, 47 U.S.C. § 332(c)(7) precludes inconsistent remedies using § 1983).

[12] The United States also quotes legislative history to argue that when adopting SARA, Congress assumed that liable persons could not pursue cost recovery under Section 107(a). *See* U.S. Br. 29. The statement cited by the United States carries no such implication. A congressional committee stated that SARA would not affect the United States' ability to maintain a cause of action under Section 107(a). This does not necessarily imply, as urged by the United States, that cost recovery by liable persons other than the United States was unavailable under Section 107(a). Nor does it imply that such cost recovery actions would "not survive the enactment of Section 113(f)." U.S. Br. 29.

made it clear that the United States was subject to CERCLA just as any other entity:

> "Each department, agency and instrumentality of the United States . . . shall be subject to . . . this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity. . . ." CERCLA § 120(a)(1).

Under Section 107(a)(4)(A), the United States may recover response and remedial action costs at a site even if it is a liable party. But the United States argues that Congress did not apply CERCLA "in the same manner and to the same extent" to "nongovernmental entit[ies]." CERCLA § 120(a)(1). Rather, the United States argues that Congress made precisely the opposite public policy choice for nongovernmental liable persons, foreclosing cost recovery under Section 107(a). The United States cannot explain how its preferred result squares with Section 120(a)(1), quoted above.

For many years, this Court has pointed out that the purpose of CERCLA's liability scheme and its remedies is to allow cleanup costs to be shared by all responsible parties. *See, e.g., Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21 (1989), *overruled on other grounds, Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) ("The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup.") (Brennan, J., plurality opinion); *see also* U.S. Br. 2 (recognizing the "two goals" of

CERCLA as providing for cleanup of hazardous substances and "to hold responsible parties liable for the costs of these clean-ups"). Allowing liable persons to pursue cost recovery claims under Section 107(a)(4)(B) advances CERCLA's purpose. By contrast, the United States' argument frustrates CERCLA's fundamental plan of promoting cleanups by allowing equitable sharing of cleanup costs.

The incongruous results urged by the United States should be rejected. The United States is subject to CERCLA "in the same manner and to the same extent" as any nongovernmental entity. CERCLA § 120(a)(1).

6. The United States' argument is also contrary to the long-held positions of the federal agency charged with enforcing CERCLA. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212–13 (1988) (declining to give weight to federal government's interpretation where it was inconsistent with prior interpretation); *see also Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003) ("administrative interpretations . . . not [the] products of formal rulemaking . . . nevertheless warrant respect").[13]

In 1984, EPA adopted a CERCLA settlement policy recognizing that administrative and

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[13] To be clear, in the view of the Amici States, Section 107(a)(4)(B) is unambiguous and it is not necessary to resort to EPA's view of its meaning. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Coun., Inc.*, 467 U.S. 837, 865–66 (1984). However, if the Court disagrees, EPA's statements and actions mirror the Amici States' position.

enforcement "litigation will not be sufficient to accomplish CERCLA's goals, and that voluntary cleanups are essential to a successful program for cleanup of the nation's hazardous waste sites." EPA stated that it is "preferable for private parties to conduct cleanups themselves." EPA, *Interim CERCLA Settlement Policy*, 50 Fed. Reg. 5034, 5035 (Feb. 5, 1985).

In 1990, EPA added Subpart H to the National Contingency Plan (NCP) to address how voluntary parties can recover costs from other parties. *See* 40 C.F.R. pt. 300, subpt. H. (2006). EPA explained first that the "focus of" Subpart H "is on those authorities of CERCLA that allow persons other than governments to respond to releases and recover response costs." *National Oil and Hazardous Substances Pollution Contingency Plan*, 55 Fed. Reg. 8666, 8792 (Mar. 8, 1990). Section 107(a)(4)(B) "establishes a right of action . . . for cost recovery in those cases where non-governmental parties have incurred necessary response costs consistent with the NCP." 55 Fed. Reg. at 8796. EPA construed Section 107(a) to "encourage private parties to perform *voluntary* cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination." 55 Fed. Reg. at 8792–93 (emphasis added).

In its regulations, EPA provides a "summary" of the "mechanisms available to recover the costs of response actions under CERCLA." 40 C.F.R. § 300.700(b). The regulation provides for cost recovery by "any other persons," and subsection (5) of that section provides detailed directions for "private

party response actions" and does not reference whether the private party is "innocent." 40 C.F.R. § 300.700(c).

B. Denying Recovery Of Response Costs Under Section 107(a)(4)(B) Will Frustrate Voluntary Cleanups And Defeat The Core Purposes Of CERCLA

1. This Court has recognized that Congress enacted CERCLA to remedy the serious environmental and health risks posed by pollution. *See United States v. Bestfoods*, 524 U.S. 51, 55 (1998). Further, one of the main purposes of CERCLA is to promptly clean up hazardous waste sites. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996) (citing with approval *Gen. Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990)). Prompt cleanup of hazardous waste sites is furthered by construing Section 107(a)(4)(B) reasonably to allow all responding parties to seek recovery of cleanup costs. If voluntary actors who remediate hazardous waste sites cannot seek recovery of costs, CERCLA's purpose of prompt clean up will be frustrated. *See* Michael P. Vandenbergh, *The Private Life of Public Law*, 105 Colum. L. Rev. 2029, 2089–90 (2005) (former EPA Chief of Staff explaining that without a private right of action under CERCLA, "far fewer Superfund cleanup actions will occur and that the public fisc will bear the enforcement costs of those that do").

Cost recovery is thus a critical incentive for voluntary cleanup actions. *See, e.g.*, ABA, Luis Nido & Jason Hutt, *Voluntary Cleanups-Alive after Aviall?*

20 Nat. Resources & Env't (Fall 2005) ("voluntary cleanups are likely to be adversely affected by [*Aviall*]. . . . [M]any sites that would have been cleaned up voluntarily . . . now are likely to linger unattended . . . ."); Donn L. Calkins, *CERCLA Contribution Actions After Cooper v. Aviall*, 34 Colo. Law. 99, 103 (Sept. 2005) ("For the time being, the voluntary cleanup of hazardous waste sites by PRPs must be considered ended—at least for PRPs hoping to recover a portion of their cleanup costs.").[14] As explained in *Metropolitan Water*:

> "Were a cost recovery action unavailable in these circumstances, the Second Circuit reasoned, 'such parties would likely wait until they are sued to commence cleaning up any site for which they are not exclusively responsible because of their inability to be reimbursed for cleanup expenditures in the absence of a suit.'" *Metro. Water*, 473 F.3d at 836 (quoting *Consol. Edison Co. of New York v. UGI Utils., Inc.*, 423 F.3d 90, 100 (2d Cir. 2005)).

As illustrated by *Metropolitan Water*, there are significantly contaminated sites where the government has taken no enforcement action, and where cost recovery remains a key incentive for voluntary

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[14] *See also* Joseph Ferrucci, *No Contribution Claims for Voluntary Cleanups of Superfund Sites: The Troubling Supreme Court Decision in Cooper Industries v. Aviall Services*, 12 Hastings W.-N.W. J. Envtl. L. & Pol'y 73 (Fall 2006); Callie Campbell, Note, *Cooper Industries, Inc. v. Aviall Services, Inc.: A Superfast End to Voluntary Cleanups and Efficient Environmental Management*, 13 Southeastern Envtl. L.J. 203 (Spring 2005).

responders.[15] *See Metro. Water*, 473 F.3d at 837 ("In the present case, the EPA simply is not in the picture and has no reason to purse [sic] a settlement.").[16]

2. The United States implies that only voluntary cleanups resulting from a negotiated settlement with the government advance CERCLA's purposes. U.S. Br. 41. The United States argues that by adopting SARA to codify contribution rights in Section 113(f), Congress intended to discourage independent cleanups in favor of government settlements. U.S. Br. 42.[17] The United States wades through CERCLA and SARA legislative history to support this contention, but even after this effort, the United States points to nothing where Congress expressed that view.[18]

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[15] The plaintiff in *Metropolitan Water* is a governmental entity, but is not a "state" under Section 107(a)(4)(A) and does not take enforcement action.

[16] In addition to removing cost recovery under Section 107(a) as an incentive for voluntary cleanup by liable persons, the United States' interpretation of Section 107(a) would inevitably chill "innocent" parties from incurring response costs. Even presumptively innocent persons would rationally hesitate to incur response costs when faced with the risk of costly litigation that might later conclude that the person is not "innocent" under the broad categories of Section 107(a)(1) through (4) or the demanding defenses of Section 107(b).

[17] The United States concedes that the legislative history of SARA "does contain references to the desirability of voluntary cleanups." U.S. Br. 41.

[18] The most telling legislative history directly contradicts the interpretation offered by the United States. *See* H.R. Rep. No. 96–1016, *reprinted in* 1980 U.S.C.C.A.N. 6119, 6136 ("to provide a mechanism for prompt recovery of monies expended for the costs of [remedial actions] from persons

For reasons previously discussed, resort to legislative history is unnecessary because the natural reading of Section 107(a)(4)(B) supports a right of cost recovery for liable and non-liable persons. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("courts must presume that a legislature says in a statute what it means and means in a statute what it says there").

Moreover, the United States' interpretation of legislative history starts from a false premise. It argues that independent or voluntary cleanups will occur "at the expense" of cleanups overseen by the government. U.S. Br. 41–42. The United States does not demonstrate how this would be so. The legislative history explored by the United States, read fairly, confirms congressional support for voluntary cleanups. It does not support the United States' theory that settlements with the United States would be impaired simply because a party who independently cleans up a contaminated site consistent with the NCP may recover some costs from other liable persons under Section 107(a)(4)(B).

The United States' argument cannot overcome the simple fact that CERCLA allows the federal government to take enforcement actions or to engage liable persons in settlement discussions as it chooses. The potential for a claim under Section 107(a)(4)(B) does not impair these enforcement powers of the government.

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responsible therefore and to induce such potentially liable persons to pursue appropriate environmental response actions voluntarily.")

3. The United States' argument is also undercut by the fact that CERCLA contains safeguards ensuring that voluntary cleanups are conducted properly before response costs can be recovered. Cost recovery is limited to response costs "consistent with the national contingency plan." CERCLA § 107(a)(4)(B). Response costs also must be "necessary." CERCLA § 107(a)(4)(B). Response costs that are "necessary" and are "consistent with the" NCP are matters of settled CERCLA law. *See Regional Airport Auth. of Louisville v. LFG, L.L.C.*, 460 F.3d 697, 703–04, 706–07 (6th Cir. 2006) (costs are necessary where there is an actual or real threat to human health or the environment, and costs are consistent with the NCP where they are in substantial compliance with the NCP); *see also* 40 C.F.R. § 300.700(c)(3) (detailed guidance for private parties regarding consistency with the NCP for response actions under Section 107(a)(4)(B) to ensure "a CERCLA-quality cleanup"). Thus, to be eligible for cost recovery under Section 107(a)(4)(B), a voluntary cleanup must comport with the government's regulatory scheme.

C. CERCLA Should Be Interpreted To Avoid Creating A Serious Tension Within The Federal Government If Section 113(f) Is The Only CERCLA Remedy For Liable Persons

As noted by the court of appeals below, if Section 113(f) is the only remedy for a liable party, then the federal government could "insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle." *Atlantic*

Research, 459 F.3d at 837. As this Court has held, Section 113(f) provides for contribution "only 'during or following' a civil action under § 106 or § 107(a)." *Cooper Indus.*, 543 U.S. at 168. Thus, CERCLA is structured so that the United States has significant control over these preconditions for a Section 113(f) contribution claim. To illustrate this control, the cleanup costs of a responsible party can be memorialized in a consent decree under Section 106, but only if the United States agrees. If the United States does not exercise enforcement authority under Section 106 or Section 107, the responsible party will be unable to file a Section 113(f) contribution claim. Such a liable person will have no remedy unless Section 107(a)(4)(B) allows it to recover those response costs. Thus, the United States can largely control whether a liable party has a Section 113(f) remedy to recover costs from other liable parties.[19]

1. The United States does not deny that its reading of CERCLA would create this tension; it responds by saying "[t]here is no factual basis to support" the suggestion of the court below that it would actually implement CERCLA in this fashion. U.S. Br. 44. The United States' response, however, fails to confront the statutory interpretation issue. It would be odd for Congress to incorporate this potential conflict into CERCLA, given the law's overriding concern with promoting cleanup of hazardous waste sites. CERCLA need not and

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[19] An exception would be those instances where a state uses CERCLA to bring a Section 107(a) action or settle with the responsible party under Section 113(f)(3)(B). The effect of this alternative on the states is discussed in Section III.D., below at page 25.

should not be interpreted to create this tension between the regulatory responsibility of the United States and the financial interests of federal agencies who are liable parties at contaminated sites.

2. The facts of *Atlantic Research* illustrate why Amici States raise this concern. Before this Court decided *Cooper Industries*, the United States, as a potentially liable party, and Atlantic Research were negotiating a financial settlement that would have reimbursed Atlantic Research for the government's share of the cleanup. *See Atlantic Research*, 459 F.3d at 829. However, when *Cooper Industries* made it clear that Section 113(f) was not available if there was no Section 106 or Section 107 civil action, the United States ceased negotiations and contended that Atlantic Research had no remedy—it could not pursue Section 113(f) contribution, and Section 107(a)(4)(B) was unavailable. *Atlantic Research*, 459 F.3d at 829–30.[20]

This history of dealings in *Atlantic Research* is not offered to suggest the United States' motive in ceasing negotiations. It simply illustrates the tension in CERCLA that results if the federal government can avoid cost recovery from another liable party under Section 107(a)(4)(B), and Section 113(f) is the sole remedy for liable parties.

3. It is vital that the right of cost recovery provided for by Section 107(a)(4)(B) is available at the thousands of hazardous waste sites where the

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[20] The record does not indicate that the United States had any defense to liability under Section 107(a) or (b).

United States is potentially responsible under Section 107(a).[21] The federal government's liability under CERCLA is provided by Section 120(a). A right of cost recovery to liable parties under Section 107(a)(4)(B) fulfills the United States' avowed position that the federal government seeks a level playing field under CERCLA.[22] The playing field is not level if Section 113(f) is the sole CERCLA remedy when a liable person undertakes a voluntary cleanup.

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[21] According to EPA, there are 172 federal facilities on the National Priorities List (NPL), which is 12.7 percent of all NPL sites. However, these NPL sites represent only a small fraction of the total number of contaminated sites for which the United States is liable under CERCLA. For example, according to the Department of Defense's 2006 Defense Environmental Restoration Program Report, *available at* https://www.denix.osd.mil/denix/Public/News/OSD/DEP2006/deparc2006.html (visited Apr. 4, 2007), within the Department of Defense there are 4,875 active installations, 2,173 formerly used defense sites, and 1,230 base realignment and closure sites that need investigation or remedial action, a total of 8,278 sites.

[22] In an October 4, 2001, letter, former EPA Administrator Whitman described the United States' position as "commit[ted] to a level playing field between Federal agencies and departments and the private sector. Americans rightfully expect their government to abide by the same environmental laws and standards as private business . . . ." Letter from Christine Todd Whitman, EPA, to James M. Jeffords, United States Senate (Oct. 4, 2001) *available at* http://www.epa.gov/compliance/federalfacilities/ (visited Apr. 4, 2007) (click on link to .pdf of letter).

D. State Discretion To Direct Limited Resources Will Be Undermined If Cost Recovery Requires A Contribution Right Under Section 113(f)

If there is no cost recovery right for responsible persons under Section 107(a)(4)(B), financial limitations will affect how private actors and local governments address contaminated sites. As this Court observed in *Key Tronic*, 511 U.S. at 820, the addition of responsible parties at a site "increases the probability that a cleanup will be effective and get paid for."

Without cost recovery under Section 107(a), willing parties who would voluntarily clean up contaminated sites will seek state settlements or state legal action to satisfy the prerequisites to seeking contribution under Section 113(f). This creates a very real concern that the Amici States will be requested to redirect their limited resources to sites where they otherwise would not be needed. And it raises the very real likelihood that, unless the Amici States agree, the sites at issue will remain contaminated. Rather than focus on the highest risk cleanup sites, the Amici States will be pressed to shift resources to sites where persons are willing to conduct voluntary cleanups, but now seek state involvement to ensure access to Section 113(f) contribution rights.[23]

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[23] States' hazardous waste programs generally focus on hazardous waste sites presenting the greatest danger to human health and the environment. *See, e.g.*, Wash. Admin. Code 173-340-320 (providing a scheme for assessing and ranking hazardous waste sites).

The choice will have real consequences for the Amici States. If the State does not take enforcement action or enter into a settlement at the request of a liable person willing to undertake a voluntary cleanup, that cleanup may be financially impossible. This will result in fewer cleanups across the country, including "brownfield" cleanups.[24] On the other hand, if the State chooses to dedicate its resources to voluntary cleanups, it will have diminished resources available to address higher-risk sites.

As an example, following this Court's *Cooper Industries* decision, the state of Washington was asked to take action at a site where the United States is a liable person but has not taken any enforcement actions. The former Atomic Energy Commission bus lot site is located in Richland, Washington, near the Hanford Nuclear Reservation. The site is contaminated from use by the Atomic Energy Commission, the predecessor of the Department of Energy, in the 1940–50s as a vehicle maintenance facility. Battelle Memorial Institute now owns the site and seeks to redevelop it to create additional research facilities. Prolonged negotiations with the United States came to an impasse after *Cooper Industries* and the United States informed Battelle that it must seek a settlement under Washington's cleanup law to facilitate a contribution

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[24] CERCLA defines a "brownfield site" to be "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." CERCLA § 101(39)(A).

claim against the United States under Section 113(f)(3)(B).[25]

The Battelle bus lot example also contradicts the United States' speculation that increased property values stemming from remediation will create a sufficient incentive to fulfill CERCLA's goals. U.S. Br. 43. The costs of remediation depend on the nature and extent of the contamination. They are not a function of the market value of the property and can easily exceed that value. In such scenarios, the availability of cost recovery from other liable parties, including the United States, will determine whether a cleanup is financially feasible. Equally important, the United States' speculation is contrary to CERCLA's goal that everyone liable should contribute to the costs of cleanup. *Union Gas Co.*, 491 U.S. at 21.

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[25] The United States may suggest that state law can provide additional recovery of costs between liable parties and thus address the concerns of Amici States. Many state hazardous waste cleanup laws provide contribution and cost recovery rights. *See, e.g.*, Wash. Rev. Code § 70.105D.080. CERCLA, however, is the only certain remedy for former federal facilities. That is because the United States has not agreed that state cleanup laws apply to former federal facilities. *See* CERCLA § 120(a)(4) (waiving sovereign immunity of the United States to state laws "concerning removal and remedial action . . . at facilities owned or operated by a department, agency, or instrumentality of the United States" and not on the NPL). *Compare Crowley Marine Servs., Inc. v. Fednav, Ltd.*, 915 F. Supp. 218 (E.D. Wash. 1995) (holding that waiver in Section 120(a)(4) only applies to sites currently owned or operated by government) *with Tenaya Assocs. Ltd. P'ship v. U.S. Forest Serv.*, 1995 WL 433290 (E.D. Cal. 1993) (holding that Section 120(a)(4) waiver applies to sites previously owned by the government).

IV. CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit Court of Appeals should be affirmed.

RESPECTFULLY SUBMITTED.

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April 5, 2007